

TRAFFIC MANAGEMENT

MANUAL 65

GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION

UNDER SECTION 1 OF THE ACT—
FACTORS IN UNREASONABLENESS

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THE PURPOSE OF THIS MANUAL AND TRAINING SUGGESTIONS

THE first step in the preparation of a rate case for trial before a state or Federal regulatory tribunal is to determine the most effective kind of evidence that can be offered in support of the major allegations, or assertions, of the complaint. In other words, what kind of evidence shall the complainant present to the Commission to prove conclusively that the rate assailed is unreasonable, unduly prejudicial, or otherwise in violation of the statute? What elements and what factors, surrounding the particular rates, is the Commission going to consider as most vital and convincing in making its decisions?

The purpose of this text is to provide answers to these questions. Doing so entails discussing the important rate-making principles which have been established by the courts and the Commission and making application of them under the class of cases that most frequently are the subject of formal complaint before the Commission.

Before undertaking this, however, attention is directed briefly to the important basic principles of the law of evidence, with especial emphasis on the burden of proof, and the doctrines of *res judicata* and *stare decisis*, both of which are explained in the text. Next, the rate-making principles are treated in connection with the class of cases in which they most frequently appear, namely, in cases involving the reasonableness of rates.

For men interested in work of this character the text provides reading which is intensely interesting as well as intensely practical. The fact that the discussion is profusely illustrated by quotations from Supreme Court and Interstate Commerce Commission decisions serves not only to impart a feeling of confidence in the soundness of the author's views, but likewise to give added zest to the pursuit of a subject to which it is so evident that many of the most able men in the country have given and are continuing to give their best efforts.

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Chapter I

KINDS OF RATE CASES

THE skill with which the evidence is selected vitally affects the outcome of a rate case before the Interstate Commerce Commission. Thus, evidence that is material and convincing in one case may be wholly irrelevant and inadmissible in another. The intelligent presentation of evidence requires an intimate knowledge of the different kinds of rate cases and of the most effective grounds of proof in each.

The problem of suiting the evidence to the case provides the subject of this and the two succeeding manuals. The various grounds of proof, which are effective in cases arising under the principal sections of the Interstate Commerce Act, are explained and illustrated in these three manuals. The first two are devoted to grounds of proof in cases arising under Section 1 of the Act, while the third deals with cases under Sections 2, 3, 4, 6, 13, and 15, of the Act. Throughout these manuals, the Interstate Commerce Act is for convenience, frequently referred to as "the Act," and the Interstate Commerce Commission as "the Commission."

Definition of a Rate Case. The term "rate case" ordinarily means a case brought by a complaint before the Interstate Commerce Commission, assailing the freight rates on certain articles of commerce which are being transported by railroad from points in a single state or in a number of states to points in some other state or states. The practice before the Interstate Commerce Commission is employed as the standard, but the same procedure is appropriate in conducting rate cases before the state commissions.

Jurisdiction of the Interstate Commerce Commission. The Interstate Commerce Act gives the Commission power to prescribe rates, or fares for the transportation of: passengers as well as freight by railroad; oil and other liquids, except water, by pipe line; telegrams by wire or by radio. It also gives the Commission power to prescribe charges for the delivering, storage, and handling of property. In addition, the jurisdiction of the Commission applies when there is a movement partly by rail and partly by water.^① The Commission also has authority to prescribe through routes, and to fix the divisions of the rates, fares, and charges which each of the carriers participating in joint rates shall receive.^②

The fixing of joint rates plays an important part in a proceeding brought for the purpose of requiring the establishment of through routes, but the fixing of divisions of such rates requires a special kind of rate case in which the carriers are the principal parties. The shipping public, as such, has no concern in rate division cases unless it happens to be financially connected with one of the contending lines of railroad.

Kinds of Rate Cases. In this manual the discussion is confined, generally, to cases involving rates for what is known as "line-haul" movements of freight by railroad, as distinguished from the special charges incident to the receipt and delivery of freight before it is ready to be hauled or after it is tendered by the carrier at destination. No attempt is made to describe the grounds of proof in cases involving the many other subjects that the Commission deals with on formal complaints, such as the charges for demurrage, track storage, refrigeration, rules and regulations governing the transportation of explosives and baggage, and the marking, packing, and loading of property.^③

^① Interstate Commerce Act, Sec. 1, pars. 1 and 2.

^② Interstate Commerce Act, Sec. 1, par. 4.

^③ Interstate Commerce Act, Sec. 1, par. 6.

There are three bases upon which rate cases may be identified:

1. From the standpoint of tariff publication.
2. From the standpoint of the territories of origin and destination.
3. From the standpoint of the sections of the Interstate Commerce Act alleged to have been violated.

On Basis of Tariff Involved. A rate case may derive its name from the method in which the rates in question are published. For example, in Central Freight Association Territory there is a class tariff that contains a scale of rates in table form, graded according to distances, with varying rates for each of the six classes. In a case involving an article taking a class rate in this scale, for reasons explained later, the evidence would be directed at the rating of the article itself, and not at the rate.

CLASS-RATE CASES. A class-rate case may involve the rate on one article taking a class rate, or it may embrace the entire class scale on all articles listed in the governing classification. In like manner, a class-rate case may be brought with respect to single points of origin and destination, such as Columbus, Ohio, or Indianapolis, Ind., or it may involve the entire graded scale on all articles in the territory in which the scale applies. A case such as the latter affects all communities within the territory and is necessarily a proceeding of vast scope and importance. A class-rate case rarely involves the percentage relation of one class to another, such as the relation of sixth class to first class.

CLASSIFICATION-RATING CASES. A class-rate case is distinguishable from a classification-rating case. In a classification-rating case the issue is whether a certain article is or is not accorded an improper rating in the classification. This type of case also is of major importance. Rarely is the entire classification under investigation. The only case on record which involves the entire classification is the one known as the *Consolidated Classi-*

fication Case.^① In that case, an attempt was made to obtain uniformity in the list of articles, packing requirements, package descriptions and rules, in the three major classifications, namely, the Official, Southern, and Western. The magnitude of that proceeding is indicated by the fact that an entire volume of the Commission's reports, Volume 54, is devoted to that case.

A classification-rating case may be regarded as a special type of rate case having the peculiar property of not bringing into issue any particular rate. A change in the classification of an article usually makes a change in the rates to be charged on that article. Of course, the classification itself, with minor exceptions, contains no rates.

COMMODITY-RATE CASES. A commodity-rate case derives its name from the fact that a particular article is accorded a special rate, which is different from the class rate. Except where the tariff by an alternative provision, makes a lower class rate supersede a higher commodity rate,^② it takes precedence over the class rate which, in the absence of the commodity rate, would apply on the article. Commodity rates are usually lower than the corresponding class rates, and are frequently carried in separate and special tariffs each dealing with a single article or only a few related articles. For example, wherever there is a substantial movement of coal, the rates are carried in commodity tariffs and are much lower than the class rates on coal. A large percentage of the individual rate cases brought before the Commission involve commodity rates on one or more special articles between restricted areas of origin and destination. For example, such a case might involve the rate on iron pipe from Youngstown, Ohio, to Milwaukee, Wis., and this would be typical of the simplest type of commodity rate case.

There are instances where commodity rates exceed the contemporaneous class rates between the same points, but

^① 54 I.C.C. 1.

^② *Porter Case*, 15 I.C.C. 1, 5.

the Commission has frequently said that such situations, while not unlawful, require special justification to warrant their continuance.^①

SPECIAL SERVICE CASES. The tariff publications give rise to other forms of cases based upon the rules, regulations, and practices prescribed in the tariffs in connection with both class and commodity rates. Among the more important cases of this character are those involving the "transit" rules, which govern the stopping of articles in transit for further process of manufacture and the like. For example, the involved and lengthy rules governing "transit" on grain, cotton, and lumber, are familiar subjects of dispute between shippers' and carriers' agents. Other cases involve the rules governing diversion and reconsignment of carload freight. The provisions governing the routes over which joint rates apply, often give rise to so-called "misrouting cases" where the tariff naming the joint rates fails, for example, to provide specific routing in connection with a joint commodity rate.

INVESTIGATION AND SUSPENSION CASES. Tariff publication gives rise to what are known as "suspension" cases growing out of tariffs that contain rates which have been published to become effective in the future, but which the Commission has "suspended." The order of investigation and suspension, issued by the Commission, may suspend the effective date of a class rate, a classification rating, a commodity rate, or of a tariff rule governing transit, reconsignment, routing applicable in connection with joint rates, demurrage, or any other special service.

On Basis of Territory Involved. The size of the territory embraced in a rate case is indicative of the extent of proof that must be offered. A rate case which embraces but one point of origin, one point of destination, and one commodity, requires comparatively simple proof and a short record. A case embracing the class or commodity rates in a large area, such as Southern Territory, or West-

^① *Indianapolis Freight Bureau Case*, 15 I.C.C. 367, 369.

ern Trunk Line Territory, requires elaborate presentation and the hearings ordinarily consume several weeks devoted to the taking of testimony.

The more extensive a case is in point of area and the number of commodities considered, the more complex and difficult becomes the subject of proof. The major cases, such as the larger class-rate cases, require a close investigation into the net operating revenues of the carriers in the territories involved. This class of evidence is seldom touched upon in the simpler cases, such as one involving the rate on iron pipe from Youngstown to Milwaukee. Thus, proof which would be vital in the major cases would be immaterial and inadmissible in small cases. Comparatively few rate cases are large enough to affect seriously the operating revenues or general balance sheets of the defendant carriers.

On Basis of Section of the Act Involved. Rate cases may also be classified according to the sections of the Interstate Commerce Act that are alleged to be violated. Certain key words and section numbers are commonly used in interstate commerce rate practice to denote the kind of case in issue.

SECTION 1 CASES. A Section 1 case means a case in which the rates are alleged to be *unjust and unreasonable* in violation of Section 1 of the Act.

SECTION 2 CASES. A Section 2 case means one in which the issue is *unjust discrimination* under Section 2 of the Act.

SECTION 3 CASES. A Section 3 case is one involving *undue prejudice* to the complainant and his traffic and *undue preference* of others and their traffic.

SECTION 4 CASES. A Section 4 case is one involving a rate to an intermediate point which is higher than the rate to a farther distant point or one in which the joint single-factor rate between two points exceeds the aggre-

gate of the intermediate rates between the same points. These provisions of Section 4 are known respectively as the long-and-short-haul provision of Section 4, and the aggregate-of-intermediates provision of Section 4.

Cases in which the carriers are seeking, by an application to the Commission, to be relieved from the provisions of Section 4 of the Act, that is, to be permitted to charge higher rates to intermediate points than to farther distant points, are known as "Fourth Section Application cases." Frequently these applications are set for hearing in connection with formal complaint cases which may embrace issues under other sections of the Act, such as Sections 1 and 3.

SECTION 6 CASES. A Section 6 case is one in which the complaint alleges that the rates charged on certain shipments are not those applicable under the published tariffs, and are therefore illegal. For example, the carrier's tariff may name a specific rate on iron pipe which is higher than the rate on culvert pipe. A complaint that the higher rates were assessed on certain shipments of culvert pipe, on which the lower rates were legally applicable under the tariff description, would be a Section 6 case.

Section 6 of the Act is the section which provides that the tariffs or rate schedules shall be filed with the Interstate Commerce Commission under rules^① prescribed by that body. Therefore, this example comes within the provisions of Paragraph 7 of Section 6 of the Act which provides that the published schedules shall be strictly observed. In Section 6 cases, the questions usually concern points of law and therefore legal rules of interpretation are applied.

SECTION 13 CASES. A Section 13, or "Shreveport,"^② case is one in which there is an allegation that the *intrastate* rates within a state cause undue preference of

① I.C.C. Tariff Circular 18-A.

② These so-called Shreveport cases take their name from the Louisiana city of that name, which was interested in one of the leading cases, 234 U. S. 342, involving discrimination of intrastate rates against interstate commerce.

intrastate commerce and "unjust discrimination against interstate commerce." In these cases the Commission may fix the state rates, "the law of any State or the decision or order of any State authority to the contrary notwithstanding."^①

SECTION 15 CASES. Section 15 cases are those involving the establishment of through routes and joint rates, the "Investigation and Suspension" of tariffs, the "allowance to an owner for services" rendered by him in connection with the common carriage of his traffic by railroad, and the "misrouting" of shipments.^②

FINANCE CASES. Rate cases are sometimes combined with other cases arising under other sections of the Interstate Commerce Act, and more particularly with those known as finance cases. The Bureau of Finance, as a separate unit of the Commission, handles the following matters:

1. Applications for certificates of public convenience and necessity for the extensions of lines of railroad, or the construction of new lines of railroad.^③
2. Application for permission to issue securities of a railroad corporation.^④
3. Applications by carriers for loans of money from the general railroad contingent fund.^⑤
4. Applications for permission to retain earned income in excess of the fixed fair rate of return.^⑥

VALUATION CASES. Although the valuation of a carrier's property used for common carrier purposes, often becomes an element of great importance in general rate cases where the income of the carriers is likely to be seriously affected as a result of the case, and although the Commission's valuations are often used as evidence in such cases, it is improbable that a valuation case, under Section 19a of the Interstate Commerce Act, would

^① Interstate Commerce Act, Sec. 13, par. 4.

^② Interstate Commerce Act, Sec. 15, pars. 3, 7, and 8, respectively.

^③ Interstate Commerce Act, Sec. 1, par. 18.

^④ Interstate Commerce Act, Sec. 20a.

^⑤ Interstate Commerce Act, Sec. 15a.

ever be combined with a rate case. The valuation work is carried on by a separate unit of the Commission and in the cases growing out of this work there is in issue the physical valuation made by the Commission's field forces and reported by them to the Commission. In valuation hearings the carriers have an opportunity to attack the final valuation figures which have been reported by the Valuation Bureau. The nature of the proof in such a case is entirely different from that presented in rate cases. The final values fixed by the Commission in valuation cases may thereafter be used as evidence in appropriate rate cases. The importance of Commission-made valuations in the rate cases of major scope is steadily growing. Proof of this kind, when offered, is indisputable because the Commission's final valuations are fixed as if by statute.

General Rate Structure Investigations. Occasionally complaints in a certain territory are so numerous as to involve the entire rate adjustment, and the Commission may then order a general investigation of the subject upon its own motion. In that event, the Commission orders the individual complaints consolidated with the general investigation, and in this way a complainant, in a relatively small complaint, may find himself thrust into the midst of a proceeding of immense proportions. Since the passage of the so-called Hoch-Smith Resolution by Congress,^① the tendency toward the holding of general and consolidated investigations has been growing.

PRACTICAL APPLICATION

Problem. There is a heavy movement of plaster and gypsum products from Centerville, Fort Dodge, and Gypsum, Iowa; from Alabaster and Grand Rapids, Mich; the Port Clinton, Ohio, district, to destinations in Illinois, southern Wisconsin, northwestern Indiana, and on the west bank of the Mississippi River. The distances to the competitive points over the direct routes range from 200 to 594 miles, while the distances over the circuitous routes are from 262 to 765 miles.

The circuitous lines, through their tariff publishing agents, apply to the Commission for authority to publish rates via the circuitous routes to meet the rates of the direct routes at competitive destinations, and to maintain higher rates at points intermediate to such destinations. The Commission, in 122 I. C. C. 747, granted the relief requested. If you were asked what kind of a rate case this was, how would you describe it?

Solution. This is a Fourth Section Application Case. On page 7, it is explained that cases in which carriers are seeking to be relieved from the provisions of Section 4 of the Act, that is, to be permitted to charge higher rates to intermediate than to more distant points, are known as Fourth Section Application cases.

Chapter II

LEGAL PRINCIPLES IN RATE CASES

THERE are three basic principles or doctrines in jurisprudence that are also factors of primary significance in rate cases before the Interstate Commerce Commission. These principles are commonly designated as follows:

1. Burden of proof.
2. *Res judicata*.
3. *Stare decisis*.

The application of these principles to rate cases has an important effect not only upon the presentation of evidence in such cases but upon the jurisdiction which the Commission will assume over complaints alleging violations of the Interstate Commerce Act. As the discussion in this chapter, which is devoted to an explanation and illustration of these principles, provides the necessary introduction to the subject of grounds of proof, it is of fundamental value.

Burden of Proof. The burden of proof is the obligation imposed upon the party, who alleges the existence of the fact or thing necessary in the prosecution or defense of an action, to establish it by proof. "Burden of proof" is a mere figure of speech. It means the burden of establishing a case. It is a well-settled rule of law that this burden remains unchangeable through the entire case, exactly where the pleadings originally placed it. In other words, the burden of proof is created by the pleadings (complaint) and remains unchanged throughout the trial of the case. It is often confused with the expressions *preponderance of the evidence* or *weight of the evidence*.

The preponderance or weight of the evidence may shift constantly as one scale of justice preponderates over its fellow during the course of the trial, but the burden of proof always remains upon the party who has the affirmative of the issue.

Rates Increased Since 1910. The burden of proof in rate cases becomes a matter of importance by reason of the special provision in Section 15, paragraph 7, of the Interstate Commerce Act with respect to rates increased after January 1, 1910. This provision reads:

At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge is just and reasonable shall be upon the carrier

While this provision was enacted with the provision for the suspension by the Commission, of tariffs containing changes in rates, it has application in all cases involving increased rates, fares, and charges.

Prior to the enactment of this "burden-of-proof" provision, the obligation always rested upon a complainant to prove that the assailed rate, fare, or charge, was unreasonable, and the rule of common law still prevails with respect to rates, fares, or charges which have not been increased since 1910.

As a practical matter it would be difficult to find, now, any rate which has not been increased since 1910. There have been two general nation-wide increases in rates, fares, and charges and one general reduction since that year. On June 25, 1918, by *General Order No. 28*, issued by the Director General of Railroads, there was a general increase of 25 per cent, with specific increases on certain commodities such as coal and livestock. Effective August 26, 1920, as a result of the Commission's investigation in *Ex Parte 74*,^① a second general increase was applied which in general made percentage advances in the several large rate regions. Effective July 1, 1922, the Commission re-

^① *Increased Rates of 1920*, 58 I.C.C. 220.

quired a horizontal reduction of 10 per cent, in a proceeding known as *Reduced Rates, 1922*.^①

As a matter of theory it may be argued that in every case subsequent to the general increases of 1918 and 1920, the burden of proof has been and will be upon the carriers, but as a practical matter this argument is fruitless. It is doubtful whether the burden of proof provision could be construed as embracing acts of the Director General during the period of the World War. Moreover, the fact that the Commission itself ordered the increase of 1920, is in itself sufficient, in the judgment of the Commission, to overcome any technical burden of proof that the Interstate Commerce Act^② may place upon the carriers. These doubtful points were raised and argued at length during the period 1918 to 1921, and it would be a waste of time again to urge the question of burden of proof based upon the general increases of 1918 and 1920.

Investigation and Suspension Cases. The statutory burden of proof becomes important in Investigation and Suspension cases, arising out of the suspension of tariffs by the Commission. The Commission requires that the respondent carriers in such cases proceed first in the presentation of evidence. In other complaint cases where the rates have been increased since 1910 by amounts other than those authorized in *General Order No. 28* and in *Increased Rates, 1920*, the burden of proof is upon the carriers, even though the complainant is called upon first to introduce his evidence.

Burden of Proof Applies Only to Reasonableness. The statutory burden applies only with respect to the "reasonableness" of the increased rate (Section 1 cases). In complaint cases under Section 3 of the Interstate Commerce Act, where there have been specific increases since 1910, and where there are allegations of undue preference and prejudice, the burden of proof is upon the carrier

^① 68 I.C.C. 676; 73 I.C.C. 189.
^② Sec. 15, par. 7.

only with respect to an additional allegation of unreasonableness under Section 1. There is no burden upon the carrier in Section 3 cases with respect to an allegation of undue prejudice. The Interstate Commerce Act places this burden on the carrier only "to show that the increased rate . . . is just and reasonable." The words *just and reasonable* are peculiar to Section 1 of the Act, and do not appear in Section 3 of the Act which prohibits undue preference.

In Investigation and Suspension cases under Section 15 of the Interstate Commerce Act, where the carrier is undertaking to justify the proposed increases in rates, a protestant may bring an issue of undue preference. That is, he may protest the suspended schedules on the ground that they will create an undue preference of his competitor and subject himself to undue disadvantage.

While the carriers have the affirmative of the issue and proceed first in "I. & S." cases it is doubtful if the affirmative extends other than to the measure of the rate sought to be increased. It is true that decisions of the Commission have been found which hold that the burden of proof is upon the carrier also to show that no undue preference will result.^① The carrier, however, could not in fairness, be required to prove the impossibility of an unexpected result of its proposed act. The carrier should not be expected to prove the nonexistence of competition between all of the shippers who might have occasion to use the rate, should it become effective. The experienced practitioner will not place too much reliance upon the Commission's decision in the *Wickwire Steel Co. Case*. So far as is known the courts have not passed upon this question and until they do the doctrine of the Commission may be regarded as shrouded with doubt.

Res Judicata. Matters once determined by a court of competent jurisdiction cannot be questioned in a subse-

^① *Wickwire Steel Co. Case*, 30 I.C.C. 415.

quent case; and when a judgment in a former case is produced, it is conclusive evidence that no cause of action exists. This is the doctrine of *res adjudicata*, or *judicata*, as laid down by the Supreme Court of the United States.^① It means that if an action is brought and a final judgment is rendered, the parties are precluded from bringing the same question in a like action.

The rule or doctrine is founded upon two maxims of the law; first, that a party should not have to defend the same cause twice, and second, that it is for the public good that there be an end to litigation.

In order to establish a plea of *res judicata* there must generally be an identity of parties, of subject matter, and of cause of action.^②

With respect to rate cases before the Interstate Commerce Commission, it is commonly stated that there is no application of *res judicata* in the Commission's practice. This general statement is somewhat misleading and too broad. It is incorrect when applied to awards of reparation based upon particular rates charged upon particular shipments and it may or may not be correct as to shipments which may move subsequent to a decision.^③

For example, suppose the Commission should find that the rate on ten shipments of iron pipe from Youngstown to Milwaukee, which moved over a certain route on certain dates, was unreasonable, and issues an award of reparation on a basis found reasonable for the shipments. Then a new complaint is filed by the same party, again attacking the rates on the same shipments. There is no question that a plea of estoppel^④ made by defendants by reason of the former adjudication, ought to be sustained by the Commission upon the ground of *res adjudicata*.

^① *Cromwell v. Sac County*, 94, U. S. 351, 357.

^② *Words and Phrases*, Vol. 7, p. 6125-6130.

^③ In the *Waro Freight Bureau Case*, 19 I.C.C. 22, 24, the Commission found that the shipments upon which reparation was being sought, moved prior to the decision in a previous case, involving identical shipments and tariffs. The Commission therefore held that it must adhere to its interpretation of the tariffs in the previous case.

^④ A plea of estoppel is a plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them.

On the other hand, had the above shipments moved in May, 1918, and a new complaint been filed covering ten other shipments made in July, 1918 (the 25 per cent advance under *General Order No. 28* became effective on June 25, 1918), the defendant's plea of *res adjudicata* would be denied by the Commission because of the change in rates and also because it had made no finding with respect to the new shipments. Likewise, a prayer of the complainant, asking that reparation be awarded on the subsequent shipments on the basis of a rate, say of 40 cents, found reasonable on the first shipments, and relying upon the doctrine of *stare decisis*, would be denied. The doctrine of *stare decisis* is explained later but it should be noted here that the fact that a rate of 40 cents was reasonable in May, 1918, would not bind the Commission to stand upon its previous decision and find that the same rate was also reasonable in July, 1918.

Many questions of fact arise, however, which necessitate interpretations of the Interstate Commerce Act by the Commission. Its administrative rulings^① upon such questions have the force of decisions of lower courts and should stand until changed by the Commission or reversed by decisions of the federal courts. These administrative rulings are seldom disturbed and are never overruled without serious deliberation.

Stare Decisis. The legal doctrine of *stare decisis* means that when a point of law has been settled once by judicial decision, it forms a precedent for the guidance of courts in similar cases. Adherence to this legal doctrine is necessary in order to preserve the certainty and stability of our jurisprudence. It is a rule affecting the practical administration of justice.^②

Since the Commission is the only Federal tribunal of its kind in the United States, and since its decisions on questions of law are not binding upon the Federal or state

^① I.C.C. Conference Rulings Bulletin No. 7.
^② *Mead v. McGrew*, 19 Ohio St. 55, 62.

courts, it may be said, in this sense, that the doctrine of *stare decisis* has no application with respect to the Commission's decisions. Decisions of the Commission do not form a part of our *corpus juris* or judicial law of the country. Nevertheless the Commission^① has held that, while it is not bound by this doctrine, when a matter has been fully considered once and decided it must be regarded as settled, unless it appears from new facts presented that the Commission was wrong. In the *Schmidt & Sons Case*, the Commission's expression fails to point out the distinction between *stare decisis* and *res adjudicata*. The latter applies to causes of action involving questions of fact principally, while *stare decisis* is a doctrine respecting questions of law exclusively.

Moreover, in two respects the doctrine of *stare decisis* does apply in Commission practice. In numerous cases the Supreme Court of the United States has finally interpreted the Interstate Commerce Act and the powers and duties of the Interstate Commerce Commission under it. The Commission has always attempted to follow strictly the doctrine of *stare decisis* with respect to such questions. Again, the Commission, being the official repository of tariff publications, has made numerous decisions with respect to such tariffs. Often similar questions have been presented to federal courts and they frequently follow the decisions of the Commission, thus recognizing the force of its expert decisions upon such questions. A strong effort is made within the Commission to preserve the integrity and stability of such decisions and this is, in substance, the application of the very principle of *stare decisis*.

PRACTICAL APPLICATION

Problem. The Chicago & North Western Ry. and the Chicago, Milwaukee & St. Paul Ry. proposed to increase the rates on lumber, in carloads, from Chicago, Ill., and points taking the same rate, to destinations in Illinois and Wisconsin. Upon protest of the Edward

^① *Schmidt & Sons Case*, 23 I.C.C. 684, 685.

Hines Lumber Co., of Chicago, the proposed rates were suspended. In the hearing before the Commission, what burden rests upon the carrier to justify its action to increase the rates and to obtain the approval of the Commission to permit the increased rates to become effective?

Solution. The burden rests with the carrier to prove that the increased rates are just and reasonable. Where carriers can prove this to the satisfaction of the Commission, the order of suspension will be vacated and the increased rates become effective.

Chapter III

PROOF OF UNREASONABLENESS UNDER SECTION 1

THE complaint that rates are unreasonable and in violation of Section 1 of the Act is one of the most common as well as one of the most important allegations encountered in rate cases. The grounds of proof in cases involving such a complaint are so numerous and important as to require for their explanation, the remaining chapters in this manual and the entire succeeding manual. In this chapter, attention is given to the nature of Section 1 and of unreasonable rates, and the importance of value as a proof of unreasonableness.

Nature of Section 1. Section 1, which is by far the most important of all of the sections of the Interstate Commerce Act, relates to a great variety of subjects, including such matters as jurisdiction, free transportation, the commodities clause, switch connections, car service, and the extension or abandonment of lines. The term "Section 1" is used here in the vernacular of the interstate commerce practitioner, referring to paragraph 5 of Section 1, which reads as follows:

All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Originally this section was interpreted to protect the shipper against the charging of extortionate rates by the carrier, but more recently it has been interpreted to mean that the rate must be a fair price to the carrier for the transportation service which it performs, and that it must

likewise be a just and reasonable one for the shipper to pay.

Originally there was nothing in the Act to prevent a carrier from charging rates unreasonably below the cost of service, but a later amendment has given the Commission the power to prescribe not only the maximum reasonable rates which the carriers may charge, but also the minimum rates.^① This power enables the Commission to protect carriers from themselves in case they engage in carrier rate wars.

Definitions of "Unjust and Unreasonable" Under Section 1. The books are full of decisions, both by courts and the Commission, passing upon the reasonableness of rates, but it is very difficult, if not impossible, to give a satisfactory definition of reasonableness in the abstract. Only in individual cases is a particular rate found unreasonable or reasonable in the light of the facts of record. On this point the Commission says:

The words "just and reasonable" are not defined in the statute. For more than 30 years and in many thousands of reported cases the criteria and standards of reasonableness now generally recognized and accepted have been gradually developed and established for the guidance of carriers and shippers alike.^②

To be just and reasonable within the meaning of the constitutional guarantee, rates prescribed by the Commission must be fixed after full hearing, with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein. This does not mean, however, that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable. Reasonable regard must also be had for the value of the service to the public.^③

Two Kinds of Unreasonable Rates. Rates may be found unreasonable *per se*—that is, inherently unreason-

^① Interstate Commerce Act, Section 15.

^② 63 I.C.C. 117.

^③ *M. K. & T. R. R. Co. v. I. C. C.* 164 Fed. 645, 648; 2 I.C.C. 231, 259, 260; 15 I.C.C. 326, 328; and 235 U. S. 601, 607.

able in and of themselves—or they may be found to be only *relatively* unreasonable. The distinction between these two kinds of unreasonableness is evident from the two simple illustrations described in the following paragraphs.

INHERENT UNREASONABLENESS. If the rate on iron pipe, in carloads, from Youngstown to Milwaukee, is shown to exceed in a marked degree as, for example, by 50 per cent, the rates on like articles for approximately the same distances, between hundreds of other points in the same territory, and if the revenue per car, based upon the average loadings, appears clearly to be excessive in comparison with the revenues derived from many other articles of like and greater value, the Commission would then find that the rate was unreasonable to the extent that it exceeded a rate more nearly in conformity with the other rates. Such a finding would be one of inherent unreasonableness, or unreasonableness *per se*.

RELATIVE UNREASONABLENESS. On the other hand, if the principal evidence was to the effect that the rate from Youngstown to Milwaukee exceeded the rate from Cleveland to Milwaukee by 10 cents per 100 pounds, and that a fair measure of the difference in service for the additional haul, Youngstown over Cleveland, was 5 cents, the Commission would find that the rate was and is unreasonable to the extent that it exceeded or exceeds the contemporaneous rate from Cleveland by more than 5 cents. Such a finding, one of *relative* unreasonableness, is known as a *relative finding*. Under this finding the rate from Youngstown would, in the future, automatically follow any changes in the Cleveland rate by observing the 5-cent differential relationship.

Under paragraph 2 of Section 15 of the Act, when a finding of inherent unreasonableness is made, the rate fixed by the Commission cannot be departed from until changed by the Commission, whereas a relative finding

would not require the maintenance of a specific rate from Youngstown. If the Cleveland rate were increased 10 cents, the Commission's order would permit a like increase in the rate from Youngstown to maintain it on the basis of 5 cents over the rate from Cleveland. If the Cleveland rate were reduced 10 cents, a like reduction would be made in the rate from Youngstown.

Another form of relative finding is based upon commodities. For example, the Commission might require the maintenance of a rate on corkscrews, from New York to Chicago, not higher than the contemporaneous rate on patent bottle-top openers. In such cases, the inherent reasonableness of the rates themselves might or might not be touched upon in the proof.

Substantial Evidence Necessary in Proving Unreasonableness. The courts have recognized that the Congress, in placing the rate-making power in the hands of the Commission and laying down as its only guide the statutory phrase "just and reasonable," gave the Commission no further directions than to use its own judgment. The courts have also held that where the Commission has fixed reasonable rates which range within the "flexible limit of judgment,"^① they will recognize the Commission's exclusive original jurisdiction over this subject matter and will not attempt to substitute their own judgments for that of the Commission, when the Commission's orders are brought into court upon review.

However, the Commission must have substantial evidence before it and can fix rates only when, upon consideration of all the facts, circumstances, and conditions surrounding the rates assailed, it is of the opinion that unreasonableness does exist.^② The Supreme Court of the

^① In *A. C. L. R. R. Co. v. North Carolina Corp.* Com. 206 U. S. 1, 25, 26, the Supreme Court pointed out that there is a "flexible limit of judgment which belongs to the power to fix rates." The Commission may exercise this power, in prescribing rates for the future, by selecting one of a number of rates within the range of reasonableness and prescribing it as the maximum rate to be charged thereafter.

^② *Marshall Oil Co. Case*, 14 I.C.C. 210, 213.

United States has pointedly directed the Commission to consider only matters of record and not take into consideration facts or reports which have not been properly introduced in the record as evidence.^①

Factors in Proving Unreasonableness. The Commission has said that there is no one formula for determining the unreasonableness of rates. Many theories enter into the determination of such a question and many varying facts and circumstances may aid the Commission in framing its conclusions. The policy of the Commission has been not to shut off any avenue of light which might fairly enable it to see clearly the whole picture surrounding the rate under scrutiny.

From time to time, various so-called transportation-cost formulas, based in some instances upon practical tests and in others, upon theoretical allocations, have been presented to the Commission with the view to paving a way for the scientific determination of rate making. The Commission has, in many cases, pointed out the flaws and defects in such formulas, but usually it does not attempt to substitute other formulas of its own. In the final analysis, the determination of what is a reasonable rate is a matter of practical judgment and common sense in this particular field. Under the decisions of the Supreme Court,^② the Commission is regarded as a "select jury to pass upon the reasonableness and justness of railroad rates, rules, and practices."^③

Cost of Service and Value of Service. During the early years of its activities the Commission was inclined to consider that the *cost of the service*—that is, the cost to the carrier—was the all-important principle of rate making. Later, it swung to the other side of the balance and leaned far toward the principle of the *value of the service*—that is, the value to the shipper—or what is more properly

^① *Orient Divisions Case*, 265 U. S. 274; 222 U. S. 541, 547.

^② *Abilene Cotton Oil Case*, 204 U. S. 426; *Illinois Central Case*, 215 U. S. 452.

^③ *Western Advance Rate Case*, 20 I.O.C. 307, 311.

described as the policy of charging what the traffic would bear. Reversals of the Commission by the Supreme Court of the United States have restored the balance and now the Commission gives consideration to both the cost of service to the carrier and the value of the service to the shipper, as well as other matters of record.

A negative statement of these two principles presents a clearer conception of their use in ordinary rate cases, namely:

The carriers are not justified in making exorbitant charges simply because the traffic may be able to bear such charges; and on the other hand, carriers cannot be required by the Commission to transport property at a loss, or even at bare out-of-pocket cost, simply because the commercial conditions preclude the shipment of goods at remunerative rates.

ADDITIONS TO ACT. Two later additions to the Interstate Commerce Act indicate clearly that Congress has recognized that both of these two cardinal principles of rate making must enter into the determination of just and reasonable rates. In Section 15a of the Act, paragraph (2), added February 28, 1920, Congress said:

In the exercise of its power to prescribe just and reasonable rates, the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

This provision, that the aggregate rates shall yield a fair return upon carrier property as a whole, is a definite recognition of the principle which the courts have always maintained, that the carriers are entitled to rates which

will yield, not only the cost of the service, but a fair return upon their investment.

In the Hoch-Smith Resolution of January 30, 1925, Congress has recognized the principle of value of service to the shipper by requiring the Commission to study and revise the rate structures of the country, giving to agricultural products and livestock the lowest basis of rates that it lawfully can, on account of the depression declared to be existing in the economic condition of the farmers. Congress, in this resolution, also instructed the Commission to take into consideration the relation which the value of the article bears to the transportation charges.

In giving effect to this resolution the Commission may find it necessary, in connection with substantial reductions in rates on farm products, to investigate manufactured and other higher valued articles, with a view to making such increases in the rates on those articles as will offset reductions in the rates on farm products and thus provide, under Section 15a of the Act, aggregate rates which shall yield a fair return upon the carrier property as a whole.

These two rate-making principles were strikingly portrayed in the proceeding instituted in the year 1926, in which the entire territory west of the Mississippi River was, under the Hoch-Smith Resolution, seeking a general reduction in rates on farm products in the Commission's investigation in Docket No. 17,000. At the same time, the carriers in the west presented testimony in support of a plea for a general increase in rates, and they sought to justify their request on the ground that their earnings were less than the fair return fixed by the Commission under Section 15a.

It should be noted that in so-called revenue proceedings under Section 15a of the Act and in rate-structure cases under the Hoch-Smith Resolution, the reasonableness of no particular rate is in question. In every such case, however, three-fourths of the record is composed of

the misguided efforts of ill-advised parties to present some individual rate matter that should be presented under a formal complaint and in a separate proceeding.

Value of Commodity. Evidence relating to the value of the commodity under consideration is always admissible in cases before the Commission. The Commission has frequently said that value is one of the important factors to be considered in fixing reasonable rates.^① The weight which attaches to the value of the article as evidence varies considerably. Certain fundamental considerations are as follows:

1. In some cases value is of practically no evidentiary value. In the ordinary rate case, the value of the commodity should be proved and is frequently a necessary factor to be considered, but is by no means conclusive.
2. In cases of relative unreasonableness, as between like commodities, it may become a very important element.
3. In classification-rating cases it is one of the outstanding factors and should always be proved in detail.
4. In so-called "released rate" cases, or "rates based upon different or graded values of the same commodity," the item of value is the predominant feature of the evidence.
5. The passage of the Hoch-Smith Resolution has placed a new emphasis upon the question of value. The Commission is required in every pending case to consider the value of the article in relation to the aggregate freight charges per shipment.

The importance of value in these various kinds of cases is discussed in the paragraphs which follow.

VALUE IN ORDINARY CASE. The value of an article, as measured by the price, if a matter of common knowledge, is readily proved, but it is frequently quite difficult to procure competent evidence. For example, in a case involving the charges on biscuits of a certain well-known manufacture, it is a matter of common knowledge that the retail price per package is 5 cents. But, the carriers might find it difficult to prove the cost of the package to

^① *Coke Producers of Connellsburg Case*, 27 I.C.C. 125, 127.

the manufacturer or the wholesale price to the jobber. If the biscuit manufacturer were the complainant, and chose, for business reasons, not to disclose trade secrets of this kind, there is no legal means by which the carrier could compel him to do so.

ELEMENTS IN VALUE. From this simple illustration it will be noted that several elements enter into value. Prices are often indicative of correct market value but in some cases the prices are poor evidence of the real value of the article. Some of the common mineral salts, for example, may be of very low value at the point of production, but when put up and sold in packages, with medical trade names, the prices may be relatively many thousand per cent higher than the real value.

In proving value the witness must have actual knowledge of the commercial sales end of his business. He should be qualified, upon cross-examination, to show all of the different elements which go to make up a true picture of the value of the article. These elements include such factors as the cost of production, the wholesale price when loaded on cars at point of origin, the prices at destination including freight charges, the jobbers' prices, and the retail prices. In the case of vegetables, the prices for any one day at a given market might be completely misleading. The value should be proved by quoting from authoritative sources, such as government reports, the average daily prices at different markets, so as to include the wide seasonal fluctuations.

In cases where the complainant does not wish to disclose his actual prices he will be protected by the Commission but it is unwise to refuse to give some indication of value, even upon this ground. It is better practice for him to give a range of values which do not disclose the actual contract prices that he may wish to keep secret. If he refuses to give any indication of the true value, the presumption naturally arises that the value is much

higher than might ordinarily be supposed and that the complainant is withholding the evidence to help his case. Such refusal shows bias and reflects upon the credibility of his entire testimony.

CASES OF RELATIVE UNREASONABLENESS. In cases of relative unreasonableness, where the complaint rests upon the theory that the article under consideration is entitled to a lower rate than another article of much higher value, the factor of value becomes the turning point in the case, and must be fully proved.

CLASSIFICATION RATING CASES. In classification rating cases the value of the article in itself, and in relation to the density per cubic foot and the risk or susceptibility to loss and damage, must be proved with exactness. Value is one of the most important items in determining proper relative and reasonable class ratings. The question of risk in relation to value, as expressed in loss and damage claims, is often shown with elaborate detail in cases before the Commission.

RELEASED RATE CASES. Where rates are stated according to different values of the same commodity, the proof of the different values must be shown with exactness. By the so-called Cummins' Amendments, and the amendment of March 4, 1927, which is now a part of Section 20 of the Act, the carriers are made liable, under the bill of lading, for the full actual loss, damage, or injury to property transported by carriers subject to the Act, "notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading." Any such limitation is declared unlawful and void.

However, the Commission is empowered to authorize or require carriers to "establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the prop-

erty, in which case, such declaration or agreement shall have no other effect than to limit liability." The Commission may authorize or require such rates wherever it is of the opinion that rates, based upon and varying with declared or agreed values, would "be just and reasonable under the circumstances and conditions surrounding the transportation." The subject of "released rates" has involved serious difficulties in the legal interpretation of the amendment. In fact, the Commission, in its decisions upon this subject, has more than once changed its views materially.

While much could be written upon the subject of released rates, it is sufficient here to indicate that the Commission has taken the view that the carriers may establish rates on an article which vary according to the actual values, without obtaining authority from the Commission under Section 20 of the Act. For example, if several rates are published for ores which contain lead, silver, copper, and gold, as, for example, 20 cents per 100 pounds based upon actual value of \$50 per ton, and 25 cents based upon actual value of \$80 per ton, billing the ore at its actual value, to be corrected after assay, is regarded as not coming within the requirements for "released rates."

When rates are based on "releases," or limitations of liability, the carriers must procure authority from the Commission, in appropriate proceedings, before establishing such rates. The most common illustration of released rates is found in those on household furniture. A man who is about to ship his household goods finds that he may choose between (1) limiting the carriers' liability and paying charges based upon a much lower rate than if he ships his goods "unreleased," or (2) paying the higher rate and collecting actual value in case of loss or damage.

If he elects to use the lower rate, he must sign the agreement and relieve the carrier from any claim in excess of a certain amount, such as \$10 per 100 pounds, in

case of loss or damage. Moreover, he may do this without violating Section 10 of the Interstate Commerce Act, while, on the other hand, if he misstates the actual value under actual-value rates, he is liable to be prosecuted for misbilling under Section 10 of the Act. The Commission discussed this latter doctrine fully in the *Crown Overall Case*.^①

Loss or damage cases, involving limitation of liability, are court cases. The questions of whether a rate is a "released rate," whether the rates are based on actual value, and whether the rules regulating the determination of such released rates and actual values, are just and reasonable, are ones over which the Commission has exclusive original jurisdiction.

CASES UNDER HOCH-SMITH RESOLUTION. The direction of Congress, in the Hoch-Smith Resolution, that the Commission shall consider the market value of the article in relation to the freight charges, does not bring into rate cases a new element of rate making, but it does present this element in a new light. Heretofore, when evidence was offered to show that the value was very low in comparison with the freight charges, the evidence was a mere passing incident in the proof of unreasonableness of rates. But, under the Hoch-Smith Resolution, the Commission is directed, in cases involving farm products, to investigate the relation between the value of the commodity and the freight charges. The proof of value thereby takes on added importance and weight.

Moreover, in Investigation and Suspension cases, where the carriers are proposing increases in rates on special manufactured articles, such as, for example, electric motors and generators of high value, they will, doubtless, use the element of value to great advantage in order to show that such articles can stand a relatively high rate and thereby offset reductions on low-grade agricultural products.

^① 100 I.C.C. 471; also *Baker & Co. Case*, 109 I.C.C. 399.

VALUE REFLECTED IN RATES. The general principle of rate making in regard to the value of articles, is to make the rates *somewhat* in direct relation to value. For example, in the classification ratings, articles which are of high value and subject to great risk, as for example, nitro-glycerine, will be rated even higher than first class, whereas sand and gravel will take the lowest rating in the classification. The same element is reflected in making commodity rates, but not in such a marked degree, for very few of the articles which are classified highest, move in large volume, whereas many of the articles that are assigned the lowest ratings do move in large volume, and are accorded commodity rates. The fact that the level of the rate may increase with the value does not mean that there is a mathematical proportion between them. The increases in values of articles are only reflected in the rates.

The general rule is that the rates on a manufactured article are higher than those on the raw materials from which the article is made. This principle is based largely upon the presumption that added value results from further process of manufacture, as is true in the case of such articles as grain and grain products. There are exceptions to this rule. In some instances, a small percentage of an unmanufactured article consists of a commodity which is of much greater value per pound than the manufactured product. Sometimes, such higher valued raw materials may be shipped at the same rate as applies on the other raw materials that enter into the manufactured article.^①

PRACTICAL APPLICATION

Problem. In *Eastern Lime Manufacturing Traffic Bureau v. A. & B. R. R.*, where the question of commodity description for fine and coarse hydrated lime was at issue, the Commission said that segregation of the high and low grade lime should be made, but it should follow the line of value rather than that of physical appearance. The Commission has repeatedly found that rates upon the

^① *Electric Matting Co. Case*, 23 I.C.C. 378; *East St. Louis Cotton Oil Co. Case*, 15 I.C.C. 351.

same commodity, varying according to the use to which it is put, are unlawful, but has also consistently found that there is nothing unlawful in the establishment of different rates on different commodities after taking into consideration, along with other factors, the general uses to which the commodities are respectively put. In other words, lime suitable for building or chemical purposes and lime having no value for such purposes, such as agricultural and fluxing lime, are regarded as different commodities. What doctrine of rate making did the Commission follow in this case?

Solution. This is a case where the value of the commodity is the controlling factor. The Commission's finding upholds the principle of rate making in regard to the value of the article.

Chapter IV

PROOF OF UNREASONABLENESS (Continued)

THE significance of the value of the commodity, as a factor in proving unreasonableness, is duly stressed in the preceding chapter, and attention may now be turned to certain other important grounds of proof. These other factors include such matters as transportation conditions, the revenue earned by the carrier, topographical conditions, length of haul, and participating carriers. These factors are discussed in the order indicated in this chapter. Such examples are given as are necessary to explain their proper application in proving unreasonableness.

Transportation Conditions. In trying a rate case, the complainant should offer proof of the particular transportation conditions surrounding the movement. These conditions have to do with the incidents of train operations and handling of the cars, but not with the goods which are carried in the cars. The goods are the traffic, and the cars and trains as handled and operated, are the transportation.

In order that the picture of the transportation conditions may be complete, the operations should be traced, step by step, as follows:

- The kind of equipment used.
- The placing of the empty car for loading.
- The preparation of the car for the particular commodity, such as the cleaning of stock cars.
- The method of loading the car.
- The ownership of the loading track.
- The distance cars must be switched before being classified into a train.
- The kind of service required: ordinary freight, fast freight, or special.

Through what junctions and over what routes the traffic moves.

Whether it is customary to handle through to first-billed destination or whether there are delays incident to reconsignment.

What delivery services are required.

Whether the cars are unloaded promptly.

The condition in which the lading leaves the cars.

Frequently, shippers rely upon the carriers to introduce proof of transportation conditions and, all too often the result is to their dismay and disadvantage. The traffic manager should be familiar with all of the transportation details and should see that the evidence and testimony conveys a clear and correct picture of them.

Revenue Earned by the Carrier. The term "revenue," used in the singular, refers to certain bases of expressing in different units, the amounts of dollars, cents, or mills, received by the carrier under the stated rates. The usual forms of expressing revenue are per car, per car-mile, and per ton-mile. Infrequently the revenue per trainload is employed, and sometimes use is made of such units as the revenue per ton, based upon the weight of contents of car, the revenue per gross ton-mile, based upon the gross weight of car and contents, and the average percentage of empty haul compared with the loaded haul or distance. These various units are explained in the next manual under the subject of comparisons of rates.

Revenue should be distinguished from revenues. The latter, or plural form, refers to the gross revenues from all traffic, passenger and freight, or either. Revenues are shown in the composite annual reports of the carriers which are filed with the Commission as required by Section 20 of the Act.

Revenue should also be distinguished from earnings. Earnings should be used only in connection with the general balance sheet and profit and loss accounts of the carrier's business as a whole. It is a misnomer to speak of the revenue per car-mile, yielded by a specific rate, as

“earnings.” Nobody can calculate what a carrier “earns” for each mile that a commodity is hauled at a certain rate, in a carload lot.

For example, a certain salesman may receive a salary of \$100 a week. This is revenue for him, but it may or may not be earnings. His expense, incurred to derive this revenue, may exceed the revenue or salary. The revenues of railroads are likewise the moneys received, and are quite another thing from earnings.

Topographical Conditions. One element of rate making, which is closely related to *transportation conditions*, and which may have an important bearing upon a decision, is the *topographical conditions* of the roadbed over which the *traffic is transported*. Italics are used in this sentence to emphasize the distinctions between the terms so printed. Transportation conditions deal with the movement of trains over a roadbed, while topographical conditions, in rate cases, are the character of the soil upon which the roadbed is constructed, the extent of the grades encountered, the degrees of curvature of the tracks, and the climatic conditions. All of these factors affect directly the cost of maintaining the roadway and, indirectly, the speed of the trains and the tonnage rating of the engines and freight trains which pass over the line. They bear upon the cost of the service but have nothing to do with the value of the service.

Testimony of topographical conditions is seldom of value unless offered by a competent witness, such as a civil or construction engineer, who has made an actual study of the right-of-way under consideration. A witness who, upon cross-examination, admits that his knowledge of a roadbed was gained from one casual trip over that line upon a fast passenger train, makes himself ridiculous.

Certain topographical conditions are matters of common knowledge and do not require expert witnesses. For

example, it is well known that the northern transcontinental routes encounter heavy snows in winter in the Rocky Mountain regions, and have to use snowplows and sheds to keep open the right-of-way.

Sources of Information. Extent of grades and curvatures on a line may be proved by securing copies of blue prints from the engineering section of the railroad or from the files of the Bureau of Valuation of the Commission at Washington.

The Commission's field forces have accumulated, in their underlying engineering reports, complete information of this character with respect to practically every piece of main-line railroad in the United States. The summary of the engineering reports, attached to the Commission's valuations of railroads, can be procured from the Valuation Bureau of the Commission at Washington. The Interstate Commerce Act makes such reports, when final, *prima facie* evidence in all proceedings under the Act, and "in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."^①

Length of Haul. In recent years the element of distance or length of haul has been given greater and greater importance in rate making. This is due to the fact that in a large percentage of cases involving the rates from many points of origin to many points of destination, the only method that the Commission can rely upon, in order to do substantial justice to all, is to grade the rates in relation to distance. Class rates are commonly graded according to distance, usually in mileage blocks. Especially in the past few years, commodity distance rate scales have been prescribed by the Commission for application throughout extensive areas of production and consumption. This has been done even on low-grade articles such as brick, cement, and fertilizer.

^① Interstate Commerce Act, Sec. 19a, par. (i).

The distance or length of haul is in most instances one of the leading elements entering into the determination of reasonable rates, but it cannot be relied upon as the controlling element.^① Whether it is conclusive or controlling, depends upon the facts in the case.^②

The weight given to relative distances depends in large part upon the topographical, transportation, and traffic conditions. For example, if one portion of a haul, covered by one factor of a through rate, is through mountainous territory, and the second portion of the haul, covered by another factor of the combination rate, is through level, treeless plains, the factor for the mountain haul may well be higher for a much shorter distance than the factor for the level haul.

Progression of Increase. In theory, the length of the haul should govern the progression of the increase in rates, but not in direct proportion. The progression should be measured by first deducting from a total rate the amounts relatively fair for the two terminal expenses, and then adding a proportionate amount for each additional distance unit, according to mathematical proportion. The resultant rates show a decrease in yield per ton-mile as the distances increase. This is due to the fact that the allocations for terminal expenses remain constant and the line-haul portion alone changes. The percentage system of rates from points in Central Freight Association Territory to Trunk Line Territory are, or originally were, based upon this principle. The rates in this system, originated by Mr. McGraham, were worked into a specific formula based upon the Chicago-New York rates. The basis of rates which resulted, has proved very satisfactory.

Proving Distances. In many instances, parties to cases before the Commission do not follow the correct method of proving distances. Actual knowledge of distances by

^① *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 549.

^② *Muskogee Traffic Bureau Case*, 17 I.C.C. 169, 172.

the witness is not necessary. The carriers are required to keep official distance tables on file with the Commission for use in connection with class and other rates which are graded according to distances. These tables have the same legal effect as the tariffs containing rates, and distances may be proved simply by reference to the tariff number of the distance table. When rate exhibits containing distances are offered in evidence, the citation of the rate tariff by I. C. C. number is not sufficient to cover the distances. The latter must be supported by reference to the proper distance tariffs. Where distances are shown, the exhibit "must also show the authority therefore and, by lines and junction points, the routes over which the distances are computed."^① Unless these precautions are taken the exhibit may become seriously discredited by well-directed objection and cross-examination of opposing counsel.

Participating Carriers. With respect to the reasonableness of joint rates, the question of how many carriers are required to make up the through route, has an important bearing. The general rule is that for a given distance, say a haul of 100 miles, the maximum reasonable rate on an article should be greater if two or more carriers comprise the short-line route than if one carrier comprised the entire route. In other words, a joint rate may well be slightly higher than a local rate for the same distance, under the same transportation and traffic conditions.

Meaning of Participating Carrier. By participating carrier is meant one that actually comprises one leg of a through route and which actually transports the traffic over its portion of that route. Care should be taken to distinguish between a participating carrier and a concurring carrier. Not all concurring carriers actually participate in a certain joint-line transportation. The Commis-

^① Interstate Commerce Commission Rules of Practice, Rule XIII (c).

sion has prescribed the rules^① under which the carriers, that participate in transportation over through routes, shall publish their joint rates. These tariffs of joint rates are usually one of two forms: one is published by the initial carrier as agent for the several carriers, and the other is published by a publishing agent for all of the carriers who wish to join in the rates. The carriers that participate in the rates are called concurring carriers, and the authority which each carrier gives the publishing agent is called its concurrence. Concurrences are not all alike and the different forms are designated by certain symbols, such as "FX1," and "FX3." One carrier may concur only as an originating line, another as an intermediate line, and still another as a delivering line, only, while some carriers may concur as originating, intermediate, and delivering lines.

The Commission has held that a shipper may rely upon the face of the tariff for the concurrence of the several lines under the forms shown therein. The issuing agent is presumed, so far as the shipper is concerned, to have acted with authority in publishing the joint rates. In case a carrier is shown as concurring in a joint rate, when in fact that carrier did not give its authority by proper concurrence, the Commission will hold the issuing line or agent responsible. In cases of unreasonableness of rates, the question of the form or validity of the concurrence is seldom brought in question, but in rare cases the question of the participation by concurrence in certain rates, has become a turning point in the evidence. In one case the complaint was founded upon the misconception that a concurrence in a joint tariff made the concurring carrier jointly liable for reparation in a claim under Section 1 of the Act. Such is not the case.

The carrier must actually participate in the actual transportation of the shipment in order to be liable, as a defendant, in a claim for reparation based upon unreasonableness.

For example, practically every carrier in the United States concurs in the Official Classification ratings, but great numbers of them never haul any traffic at rates based upon those ratings.

Limitation upon Higher Rates for Joint Hauls. The principle that rates may be higher for joint-line hauls than for single-line hauls, of the same respective distances, has application only for hauls of limited length. The exact limit is not fixed and becomes a question of fact to be decided in each case. However, after rates have been graded upward to and beyond 400 or 500 miles, the Commission regards as immaterial the fact that the route may be comprised of one or several carriers. In fixing rate scales based upon distances, where arbitraries are to be added to single-line rates for hauls over two or more lines, the joint-line arbitraries usually decrease and finally disappear at or about the 400 or 500 mile block.

The transfers of freight from the first carrier to the second carrier, and from the second carrier to the third carrier, create additional expenses not incident to the single-line haul. This principle is often confused with another principle of rate making, which should be carefully distinguished from it. A joint rate should be less than the combination of local rates. For example, if the carrier's local rate to the first junction point is 9 cents, the local of the second carrier to the second junction point, 7 cents, and the local of the third carrier, 11 cents, a combination of these local rates aggregates 27 cents. The joint rate for this three-line haul might properly be 24 cents, or three cents less than the combination of locals. At first blush the principles may seem to conflict with the one stated above. When the illustration is understood, however, it is seen that there is no conflict, as both are in accord with sound reasoning, based upon differences in transportation services and the costs thereof.

Distances via Participating Carriers. In citing distances, care should be taken to include only such routes

as are open, or as may be specified, under the particular tariff. Some large agency tariffs, in which hundreds of carriers concur, contain commodity rates from many points of origin to many destinations scattered over large areas. Some of these tariffs carry no routing instructions and the rates apply over any lines and through any junctions of the participating carriers. Other tariffs may carry items which restrict certain rates to apply only over certain designated routes of participating carriers. Where the routes are "open"—that is, not specified—the distance selected between specific points should be that over a reasonably direct route via existing connections. Ordinarily, the shortest practicable workable route may be used. Where the rates are named for grouped origins or destinations, it may be only fair that several routes should be used.

Carrier Not Obliged to Short-Haul Itself. Those making up exhibits of rates and distances should keep another principle of rate making in mind. While the carriers have the privilege of making rates applicable over many routes, the Act places an important limitation upon the Interstate Commerce Commission's power to prescribe through routes and joint rates. Section 15, paragraph 4, provides that in establishing a through route the Commission shall not "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established." In other words, the carriers comprising through routes cannot be required to *short-haul* themselves. Care should be exercised in making up distances to select routes

via which the participating carriers will not be required to short-haul themselves.

On the other hand, in checking exhibits offered by others, care should be taken to object to the inclusion of distances over circuitous routes, even though such routes may be open under the tariffs and even though the lines participate in the tariff. In case a complaining shipper, seeking the establishment of a reasonable rate, should find that the routes available under the tariff are unduly circuitous, or unreasonably long, he need not confine his evidence to the long routes, but may ask the Commission to establish the desired rate for the future over a reasonably direct route. In doing so he must show that the carriers comprising the new route are in a position to participate in the haul of traffic over the proposed route, without transfer or lading and without unreasonably increasing the operating difficulties. A witness should be available who can give first hand testimony concerning the transportation and topographical conditions over all of the lines comprising the proposed route. The question of whether an existing route is unduly circuitous or unreasonably long, in connection with the provision against short-hauling a participating carrier, is one of fact to be determined upon the evidence adduced.^①

PRACTICAL APPLICATION

Problem. The Utah Coal operators, in the *Western Coal Rates Case*, 89 I. C. C. 666, vigorously contended that conditions of operation had been so improved since the decision in the *Consolidated Fuel Company Case* as to justify placing rates from Utah on a parity with those from the Rock Springs portion of the southern Wyoming group. They cited the improvements which consisted of the building of the Utah Railway from Utah Railway Junction to the mines at and near Mohrland. This afforded some reduction in the descending grades from those mines. The main line of the Denver & Rio Grande Western was reconstructed west of Soldier Summit, Utah, reducing the descending grade from 3.97 per cent to 2 per

^① Those interested in a more exhaustive treatment of this subject are referred to the Commission's discussion of short-hauling a participating carrier, contained in the case, *Grain from Western Trunk Line Points*, 91 I.C.C. 632.

cent, thus permitting: the movement of heavier trains, the substitution of heavier rails and larger locomotives, the building of double track facilities from Helper to Provo, and larger terminal yards at Soldier Summit.

The Commission in its finding said:

"The coal from the mines in the Castle Gate district is assembled at Castle Gate and Helper and moves west from those points over the main line of the Rio Grande. Between Castle Gate and Kyune, 9 miles, two locomotives of the Mallet type and one of the Mikado type are used to overcome the grade of 2.4 per cent on the approach to Soldier Summit. From Kyune to the summit two locomotives are sufficient. The average time consumed in the ascent from Helper to Soldier Summit, a haul of 25 miles, is four hours. At Soldier Summit the air brakes and retainers are inspected and the piston travel adjusted to insure safety in the 29-mile descent over a 2 per cent grade to Thistle. The cost of operating heavy trains over these grades with their unusual curvature is materially greater than in the more open and level country traversed by the Union Pacific System. * * *

"No unusual conditions are encountered on the main lines of the Union Pacific or Oregon Short Line west of the assembling points. At no place between Rock Springs and Ogden or McCammon, Idaho, does the grade against the loaded movement reach 1 per cent * * * such differences in transportation conditions as have here been shown cannot be disregarded in comparing the rates from the two competitive fields."

What are some of the important things shown in this case which have a bearing on grounds of proof?

Solution. The statements concerning grades relates to the topographical nature of the country, while transportation conditions are taken into consideration by the showing of the time consumed and the motive power necessary to move the traffic.

Chapter V

PROOF OF UNREASONABLENESS (Continued)

THE discussion in the two preceding chapters does not cover all of the considerations to which weight attaches in proving the unreasonableness of a rate. There are certain other elements which, while they may not enter into the determination of all Section 1 rate cases, have special significance under certain circumstances. These are treated in this chapter in the following order:

- Volume of traffic.
- Financial condition of carrier.
- Financial condition of industry.
- Voluntary reductions.
- Natural advantages or disadvantages of location.
- Rate adjustments of long standing.

Volume of Traffic. The volume of the traffic is an important factor in the determination of the reasonableness of rates, but it is only one of the many factors to be considered.^①

Decreasing Cost with Increasing Traffic. As a general rule, a considerable increase in the flow of a particular kind of traffic results in decreased cost per unit for the transportation service. The rule is based upon one of the fundamental laws of economics, namely:

As the volume of production is increased the unit cost of production tends to decrease. Expressed in terms of transportation service this principle means that as the volume of traffic increases the unit cost of transporting that traffic decreases.

This economic principle is subject to the ultimate limitation that when production is increased beyond a cer-

^① *Southport Mill, Ltd., Case*, 55 I.C.C. 154, 162; *Pillsbury Flour Mills Co. Case*, 64 I.C.C. 81.

tain stage, the rule is reversed and the cost of production begins to increase rapidly. Expressed in terms of transportation service this principle may be restated as follows: When the volume of traffic increases to such an extent that the terminal facilities of the carriers become congested, necessitating embargoes, and resulting in the backing up of cars along the main lines short of destination, the cost of transportation increases with the increased volume of the traffic. The latter situation exists only in emergencies, and scarcely needs comment in connection with determining the reasonableness of rates.

How Volume of Traffic Is Measured. · The volume of the traffic should be proved in practically every type of rate case. In cases involving class-rate adjustments in large territories, the volume of the traffic is usually expressed in terms of *traffic density*, or, more accurately, *freight traffic density*. This is shown in the annual reports to the Commission as *revenue ton-miles per mile of road*. The volume of the passenger traffic is expressed in units or averages of *revenue passenger-miles per mile of road*.

The density in one section of the country may be compared with the density in another section of the country. Such a comparison has an important bearing in determining the level of rates in different territories, because generally the region of highest traffic density is the region of lowest transportation costs. However, this is not always true. Other transportation costs in certain territories may run sufficiently high to offset the greater traffic density. By way of illustration, the traffic density between Pueblo, Colo., and Galveston, Tex., may be very light, but the operating expenses per mile of road may be also light, in comparison with the operating costs of the Denver & Rio Grande between Pueblo and Salt Lake City, Utah. The traffic density of the Denver & Rio Grande between Pueblo and Salt Lake City might be much greater than between Pueblo and Galveston, but the extreme

grades, curvatures, and operating difficulties, and the topographical conditions, may be so adverse on this line as to offset entirely the greater traffic density.

A similar deviation of the usual rule would probably be found in the case of fruits and vegetables from California to Chicago, compared with like commodities from Louisiana and Florida to Chicago. One of the most frequently encountered illustrations is the fact that the traffic density in Central Freight Association Territory is greater than in Southern Classification Territory and that therefore transportation is cheaper in Central Freight Association than in Southern Territory.

Actual Movement Should Be Shown. In dealing with specific commodity rates between small areas of origin and destination, or between specific points, the complainant should always place in evidence, a showing of the actual movement of the commodity during a representative period of time. If he is seeking the establishment of lower commodity rates he should testify concerning the average movement in the past as well as the anticipated movement in the future. The volume of the traffic is one of the most important considerations in determining the reasonableness of specific commodity rates.

In rare instances it happens that the relation of rates—for example, the rates from competitive points of origin—is the reason for the absence of any traffic from the complaining point. If a complainant's competitor has commodity rates to a certain territory, and the complainant has only higher class rates in effect, this situation may be so unduly prejudicial to the complainant that he is unable to make any shipments to that market. In such cases the Commission might fix a reasonable commodity rate from complainant's plant, based entirely on the expectation of future movement, but the complainant would have to prove conclusively that the reduced rate would create traffic in such volume as to warrant com-

modity rates. Ordinarily there is no necessity for commodity rates except where the volume of the traffic is sufficient to lower transportation costs below the level of the class rates.

The carriers cannot justify an unconscionably high rate merely because there is no regular movement of the traffic in substantial volume.^① In other words, a rate which catches the "stray dog" cannot be justified merely upon the ground of infrequency of movement.

Reparation Usually Denied on Sporadic Movements. Sporadic movements are seldom recognized by the Commission as a basis for an award of reparation. However, the Commission has awarded reparation, although rarely, in instances even where the sporadic character of the movement was fully established by the carriers. There seems to be a general tendency in the Commission's decisions towards the denial of reparation on sporadic shipments. This is due, not only to the absence of volume of traffic, but because the Commission dislikes, if we may use the term, to fix the reasonableness of the rate in the past, when it is shown that there will be no movement in the future. For example, suppose that one carload of lumber was shipped at class rates, from a newly built lumber mill, that the mill was burned down before other shipments could be made, and that the owners had no intention of rebuilding it. It is possible that the rate upon this sporadic shipment could be shown to be unreasonable even though there were no prospects of developing any volume of this traffic in the future, but the Commission ordinarily would be inclined, we think, to dismiss a case of this character on account of their dislike to make a finding for the past when there is no prospect of future movement in volume. Certainly the Commission, in this instance, could scarcely be prevailed upon to name what it would consider a reasonable rate on this commodity for the future.

^① *United Verde Extension Mining Co. Case*, 66 I.C.C. 377, 379.

In making comparisons between the rates assailed and others, the party offering the evidence must amplify the exhibits with statements concerning the relative volume of movement of the article in issue and of the article used for comparison. Also, when rates from one point are compared with rates from other points, the volume of the traffic from each point should also be shown. If the other point is a competitive point, it is not essential that the exact tonnage be given. It is sufficient to indicate in a general way what the movement consists of and whether there is a really substantial tonnage of the traffic in question. For business reasons it may be necessary to withhold the exact movement from both points, but the Commission should be given a good understanding of what the volume of the movement is. The exact tonnage is not important.

Financial Condition of Carrier. The financial condition of a particular carrier is seldom relevant to the issues in a simple commodity-rate case. A carrier of general freight and passenger traffic deals in so many kinds of transportation, under so many different conditions, that it is practically impossible to allocate the expenses of any particular kind of traffic to the one commodity. There are exceptions to this rule. For example, where a small tap line, or lumber road, handles nothing but lumber from a mill to a junction with a line-haul carrier, the expenses of the tap line are readily allocated to the lumber traffic, and a reasonable rate could be determined by direct application of the cost-plus method.

When a carrier handles both freight and passenger traffic of consequence, the allocation of expenses to certain kinds of freight traffic becomes more difficult. The Commission itself has made extensive investigations in an attempt to arrive at some fair method of separating the expenses as between freight and passenger traffic, but the methods now being used, which are about as satisfactory as any that could be devised, are admittedly arbitrary.

Special Treatment of Weak Lines. The financial condition of a small or short line of railroad may play some part in the reasonableness of rates prescribed by the Commission. For example, the Commission, in dealing with the general rate level in Southern Territory in the *Southern Class Rate Investigation* Docket No. 13494, found it necessary to give special treatment to certain so-called "weak lines," on the ground that their financial condition warranted a higher level of rates than the one provided for the standard and financially stronger lines.^①

Special consideration has also been given to roads such as the Denver & Rio Grande, and the Denver & Salt Lake (Moffat Road), on account of poor financial conditions. Certain mountain lines in New York State, serving summer resorts, have been granted authority to carry fares, higher than the standard passenger fares, on account of poor financial condition. The Florida East Coast Railway was, in the past, accorded separate treatment from the standard lines of Florida, on account of its poor financial condition. To prevent its financial disaster, the Moffat Road has been granted special concessions in the matter of divisions of through rates on coal.

In general advance and general reduction cases, involving all of the lines in large sections of the country, the financial conditions of the lines play the most important part in the determination of the proper level of the rates.

Financial Condition of Industry. Prior to the Hoch-Smith Resolution,^② the financial condition of an industry could not be adduced, as a factor to be considered in fixing reasonable rates. That is to say, the financial distress of a particular industry could not be made the foundation for a reduction in rates, unsupported by any other proof or reasons.

^① 100 I.C.C. 513, Appendix M, page 728, shows a list of weak lines in Southern Territory.

^② S. J. Res., 107 Public Resolution No. 46, 68th Congress.

After the *Willamette Valley Cases*^① were decided by the Supreme Court, the tendency was to exclude evidence bearing upon financial conditions of an industry. In those cases the Supreme Court decided that the Commission could not fix reasonable rates based upon the needs of an industry, even where a contract for the maintenance of certain rates had been made between the carrier and the shipper. The Supreme Court held that the fact that the railroad had voluntarily established a low contract rate to help the lumber industry, did not estop it from claiming a reasonable rate for the future.

Recent Views of Commission. The modern trend has been away from that decision, although the reasons advanced for considering commercial conditions of industries have changed. The Commission held in the *Rates & Charges on Grain & Grain Products Case*^② that, in considering the reasonableness of rates, economic conditions of an industry may be relevant as they bear on the value of the service to the industry, but that increased prosperity of an industry may not be made an excuse for advancing rates on commodities which that industry produces, nor may the Commission require unduly low rates on some commodities for the benefit of one class of shippers.

In the *Wool Rates Investigation Case*, 1923,^③ the Commission assumed the more advanced view that commercial and economic conditions affecting a particular industry are matters which the Commission may take into consideration, but that they are not controlling in the fixing of reasonable rates.

This doctrine found definite expression in the Hoch-Smith Resolution. In its announcement of March 12, 1925, relating to its procedure in Docket No. 17,000, *Rate Structure Investigation*, under this resolution, the Commission stated that it would give due regard, among other factors, to:

^① 219 U. S. 433.

^② 91 I.C.C. 148, 153.

^③ 91 I.C.C. 235, 249. 252.

The conditions which prevail in the several industries of the country, in so far as it is legally possible to do so, to the end that commodities may freely move,

In the future, the financial condition of an industry may be expected to become a topic of evidence in practically every hearing in cases before the Commission. Since the Hoch-Smith Resolution requires the Commission to take that resolution into consideration in every pending case, it is doubtful whether the Commission would, or could, exclude evidence bearing upon commercial and economic conditions of industry.

Voluntary Reductions. The fact that the carriers voluntarily reduce a rate does not constitute *prima facie* evidence of the unreasonableness of that rate.^① The Commission has, almost from its inception, consistently adhered to this principle of rate making.

Many cases are presented to the Commission, informally asking reparation on the basis of lower rates subsequently established by the voluntary act of the carrier. Carriers, also, frequently present cases of this kind to the Commission on the special docket, asking authority to make reparation to a shipper down to the basis of the subsequently established rate. The Commission will not issue an order on the special docket where the reliance is solely upon the voluntary reduction. The Special Docket Applications based upon this ground alone are denied, and usually the carriers and shippers are informed by the Commission that it is essential that there be other matters submitted in proof of the unreasonableness of the rate charged, before an order for reparation on the special docket will be entered.

The same principle applies in a formal complaint case. Even where no defense is made by the carriers, the Commission will not find a former rate unreasonable solely on the ground that it has been voluntarily reduced. There

must be other forms of proof establishing the unreasonableness of the prior rate.

Presumption in Voluntary Reductions. Although a voluntary reduction is not *prima facie* evidence of unreasonableness of the rate, this does not mean that such a reduction does not carry with it some evidentiary weight. There is a rebuttable presumption of fact that the carrier would not wantonly reduce its revenues without some sound reason, and where a shipper shows a voluntary reduction as evidence of the unreasonableness of a rate, there is reason to believe that the carrier should come forward with some explanation for its action. If the carrier has none, then the presumption must carry some evidentiary weight in support of the plea of unreasonableness.

Natural Advantages or Disadvantages of Location. In a long line of decisions, the Commission has frequently held that the natural advantages of the location of cities, cannot be disregarded in the determination of reasonable rates.

In fixing reasonable rates, the carriers cannot be permitted to make higher rates to cities having the benefit of natural advantages, and maintain lower rates to cities having disadvantages of location, in order to equalize their business opportunities.

In the *Investigation of Alleged Unreasonable Rates on Meats Case*,^① the Commission was urged to fix the rates on the inbound livestock and the outbound meat products so that the combined charges would be equal at different localities. The Commission said that "it is no part of our duty to so adjust rates that business will or will not be done at a particular point. . . ." The Commission stated further that, "Each packing house is also entitled to a reasonable rate upon its product to various markets of consumption, and these rates, again, should

^① 22 I.C.C. 160, 162.

be fairly adjusted with reference to one another. Any locality which remains at a disadvantage after this has been done must sustain that burden, which is due to its location with respect to this business."

In the *Chamber of Commerce of Beaumont Case*,^① the Commission said that Lake Charles, La., "has a natural or geographical advantage of which it should not be deprived." In other words, when one city is nearer a common market than another, it has a natural advantage by reason of the lesser distance, and, in fixing reasonable rates from the farther distant origin, the Commission will not remove the natural difference in distance by equalizing the freight rates.

A seeming exception to this principle exists in connection with grouped rates. One origin point may be just outside of and beyond a rate group. The rates from the outside point to a common market may be relatively higher than those from the farthest distant point within the origin group. In this case the outside point may point to the rate from the farthest distant point in the group as being relatively much lower than its rate. The answer is that the grouping must end somewhere, and that the fair comparison would be, not with the farthest distant point in the group, but with the average distance of all points in the group.^② Groups are ordinarily established by the carriers and, unless the grouping is excessively large, or improperly made, the Commission usually will not disturb the group by extending it to include farther distant points.

Rate Adjustments of Long Standing. In suspension cases, where the carriers are attempting to increase rates, the complainant should prove, if the facts warrant, that the existing rates were voluntarily established by the carriers and have been voluntarily maintained for a considerable

① 25 I.C.C. 695, 697.

② *Somerville Iron Works Case*, 102 I.C.C. 511.

period of time. Such facts raise a presumption of the reasonableness of the existing rates.

On the other hand, where a shipper is attacking a rate that was voluntarily established and has long continued in effect, these facts raise a presumption that the rate is reasonable and should not be reduced.

In the *Burgess v. Trans-Continental Freight Bureau Case*,^① which was afterwards affirmed by the Supreme Court of the United States, the Commission said with respect to a rate which the carriers had increased after it had been voluntarily maintained for a long period of time, that, "Some justification should therefore be shown for its advance," and that the fact of its voluntary establishment and long continued maintenance "is strong evidence of the reasonableness of the rate."

The presumption is a rebuttable one and "there is no conclusive presumption that a rate reasonable to-day was reasonable a year before or a day before since reasonable rates vary from time to time^②"

CONCLUSION

In this manual, which is the first of the four manuals on GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION, there are two introductory chapters devoted to an explanation of the various kinds of rate cases and the legal principles involved in such cases. The remaining chapters, three in number, contain a discussion of various factors to which weight attaches in proving unreasonableness under Section 1 of the Act.

It is now in order to turn to the second of these three manuals, and guided by the discussion in this text, to consider the evidentiary value of rate comparisons in proving unreasonableness under Section 1 of the Act. That such comparisons have great value when properly

^① 13 I.C.R. 668, 677.

^② *Penrod Walnut & Veneer Co. Case*, 15 I.C.C. 326, 328.

made, cannot be denied. However, the secret of success in using such comparisons lies in knowing how to choose between comparisons which have value and comparisons to which little or no weight attaches. The following manual, which explains and illustrates many of the more significant characteristics of rates and of the traffic moving under them upon which value in proving unreasonableness hinges, provides the key to the solution of this rather vexing problem.

PRACTICAL APPLICATION

Problem. On February 4, a carload of grapefruit shipped from Bowling Green, Fla., to Wausau, Wis., was assessed a rate of \$1.84 per box. At the time shipment moved, a rate of \$1.28 per box was in effect from Bowling Green to Duluth, and Albert Lea, Minn., and Eau Claire, Wis. This rate was later published to Wausau, Wis. Complainant alleged that rate charged was unreasonable in view of the publication of the lower rate at a later date by the carriers.

Do you consider this as sufficient grounds on which to petition the Commission for reparation?

Solution. No. The Commission will not issue an order for reparation on the basis of subsequent voluntary establishment of a lower rate. It is essential that other matters be submitted to prove the unreasonableness of the rate charged.

TRAFFIC MANAGEMENT

MANUAL 66

GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION

UNDER SECTION 1 OF THE ACT—
COMPARISON OF RATES

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THE PURPOSE OF THIS MANUAL AND TRAINING SUGGESTIONS

IN every rate contest the Commission must base its judgment primarily upon the facts presented by the parties to the case. Therefore, those bringing complaints or defending existing situations must present competent evidence in a proper manner to support their contentions. Whether one is acting in behalf of a railroad, a community, a single shipper, or an association of shippers, thorough preparation and special training for the work are imperative to cope, on an equality, with the trained and experienced adversaries he is sure to encounter.

In the preceding manual only a few of the factors to which the Commission attaches weight in passing upon the reasonableness of rates are reviewed. It is therefore in order, in this manual, to direct further attention to the kinds of evidence which prove effective in cases involving proof of unreasonableness under Section 1 of the Act.

There is vast opportunity for individual action and ingenuity in planning a rate contest and likewise for a difference of opinion as to what factors should or should not control in passing upon the reasonableness of rates in question. However, while individual traffic managers and rate experts may each have their own theories, whether they are correct or incorrect makes little difference. The significant angle of approach to a rate case is from the standpoint of the Commission. Effort should be confined, as far as possible, to presenting only such facts and arguments as one has good reason to believe will appeal to the men in whose hands the decision finally rests.

One way to discover what factors exert the strongest influence in determining the action of the Commission is to select, at random, a considerable number of its decisions and to analyze them with this end in view. As the result of such an analysis of one of the volumes of the Commission's decisions, it was found that this volume contained eighty cases which might be termed rate cases. A review of these eighty

cases points clearly to rate comparisons as the character of evidence most frequently considered by the Commission. In sixty-eight of the eighty cases referred to, this form of proof was employed and moreover in each of these cases the Commission based its decision, in whole or in part, upon that character of evidence.

For those who are interested, either directly or indirectly, in the preparation or defense of a case in which the reasonableness of rates is in issue, this manual, which is devoted primarily to the use of rate comparisons in cases before the Interstate Commerce Commission, provides a wealth of valuable and constructive suggestions.

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The diversified traffic experience of the members of the Traffic Research Staff embraces work in the governmental, railway, steamship, highway, industrial, and educational fields. Each member is especially qualified by training and experience to co-operate in the work of investigating, planning, organizing, and presenting the training material and to co-ordinate the contributions of the various authors into a well-organized and effective course.

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Chapter I

FACTORS IN THE HISTORY, CONSTRUCTION, AND APPLICATION OF RATES

CONTINUING the discussion of grounds of proof under Section 1 of the Interstate Commerce Act, this manual treats of the various kinds of comparisons which are offered as evidence of unreasonableness of rates. An examination of the Interstate Commerce Commission's reports demonstrates conclusively that in the cases where findings of unreasonableness are made, the Commission relies more upon rate comparisons than upon any other form of proof. The Commission itself has said that comparisons comprise "the most helpful evidence."^①

The witness testifying as to rate comparisons must be thoroughly grounded in the history and the manner of constructing and applying the rates which are in issue. Some of the more important features of the information which he must be prepared to give, are discussed and illustrated in this chapter.

Familiarity with Rate Structure. In making comparisons of rates to prove the reasonableness or unreasonableness of a particular rate or rates, the witness through whom the comparison is offered in evidence, should be thoroughly familiar with the general rate structure. For example, in attacking the rate on blackstrap molasses from Knoxville, Tenn., to Birmingham, Ala., a complainant's witness may offer a comparison to show that the rate assailed is much higher than the rate on the same commodity from Biloxi, Miss., to Birmingham, the distance being approximately the same in both instances. Unless the witness is thoroughly familiar with the general

^① *Mississippi Railroad Commission Case*, 89 I.C.C. 47, 61.

rate structure on molasses and the circumstances under which the rates from the Gulf Ports were established, it might be inadvisable to draw the comparison. Thus, it might give the defendants an opportunity to show that the rate from Biloxi was a water-depressed rate, made to meet the rate from Mobile, Ala., which is in turn a water-depressed rate.

The defendants might also be able to show that the Commission, in a previous case, had recognized the low level of the rates from the Gulf Ports, and has authorized the carriers to carry lower rates from the ports than from intermediate points to Birmingham and other interior cities. Or, it may be that the rate from Knoxville is related to the rates from the South Atlantic ports to Atlanta, and that the rate to Birmingham was made in relation to the rate to Atlanta.

Unless the witness is thoroughly familiar with the general rate structure in the territory surrounding that in which the points in issue are located, his comparisons may be broken down upon cross-examination and his ignorance may prove very embarrassing, not only to himself, but to his attorney and his client. The carriers' witnesses are usually thoroughly informed upon the general rate structures applicable on any article of commerce in respect to which they testify and thus, unless the witnesses on the opposite side are equally well informed, the carriers have a great advantage in being able to break down the effect of rate comparisons which the complainant is relying upon in support of the allegation of unreasonableness. It is in situations of this kind that the ability and knowledge of the capable traffic manager become most apparent.

History of Rates Compared. In comparing two rates it is not sufficient to show the history of the assailed rate only. The history of the comparable rate must also be known, thoroughly understood, and explained. For ex-

ample, suppose that since the year 1910, the rate assailed had been increased 15 cents in 1915, 25 per cent in 1918, and 40 per cent in 1920, and reduced 10 per cent in 1922. The history of the comparable rate may show that, with the exception of the 40 per cent increase of 1920, it was subjected to like increases and to a similar reduction. If the witness did not know this the defendants might bring it out on cross-examination or on their direct examination, and show that the rate used for the comparison was lower than it should be, and that, if the 40 per cent advance of 1920, authorized by the Commission, had been added, the two rates would have been upon the same relative level. This would destroy the value of the comparison.

This simple illustration is given merely to show the importance of being fully informed, not only in respect to the present rates, but also on their history. Showing the history of the rate assailed, as stated above, would be of great importance because it would show that, in justifying the increase of 1915, the burden of proof is clearly upon the defendants.

Rule III (k) of the Rules of Practice before the Commission provides that "in case violation of Section 1 of the Act is alleged, the complaint should show whether the rates, fares, or charges assailed have been increased since January 1, 1910." This requirement is made in order that the parties and the Commission may know whether the burden is on the complainant or the defendants. But it is not sufficient merely to allege this in the complaint. The proof must sustain that allegation and the history of the rate assailed must be stated, together with tariff references, by the complainant's witness.

In connection with tables of rate comparisons it is not essential that the history of each comparable rate be shown. However, the witness should, as far as possible, be familiar with the history of the rates he uses in order

COMPARISON OF RATES

that he may not find his comparisons broken down by cross-examination, as explained above.

How the Rates Are Published. In presenting comparisons of rates the witness should specify the kinds of tariffs in which the rates appear. That is, he should indicate:

1. Whether the tariffs are published by the initial carrier, or by an agent for many carriers.
2. Whether the rates are published as joint through rates, or are made by combination of locals.
3. Whether there is a specific method provided for making through rates based upon certain proportionals to and beyond certain gateways.
4. Whether the rates are class rates or commodity rates.
5. Whether the points in issue are named in the tariffs or take rates by intermediate application.
6. Whether the points in issue are included in groups of origins and destinations or take point-to-point rates.
7. Whether there are special tariff rules which govern deliveries, routes, packing requirements, or transit.
8. If all or a part of the through rate is a class rate, the governing classification or classifications.

This synopsis, while not all embracing, serves to indicate, in a general way, the things which the witness should know about the tariffs in which the rates he quotes are published.

How the Rates Are Constructed. The witness should explain, in connection with rates used for purposes of comparison, how the rates are constructed. Some of them may be full combinations of locals, while some may be joint rates to certain points plus full locals beyond. Some may be proportionals to certain grouped gateways plus joint class rates beyond; others may be constructed by the addition of arbitraries, over a basing point; while still others may consist of scaled rates plus joint-line arbitraries. Information of this kind is necessary in order that the examiner and the Commission may get a clear

picture of the rate structure. Unless it is shown that the rates used in the comparisons are exactly the same kind as the rates assailed, the value of the comparisons may be greatly lessened.

How the Rates Are Applied. The witness should be able to show, in connection with the rates used in comparison, just how the rates are applied. For example, certain rates may be applied under a distance scale using joint-line arbitraries, whereas the complainant may contend that the single-line scale should be applied on account of the common management and control by one line of another line making up the through routes. A given set of rates may apply through certain gateways and not through others. Sometimes the carriers apply certain commodity rates to analogous articles in one territory, and not in another territory. Again a grain rate may be applied on a certain list of grains and grain products by one group of carriers, while another group may apply the grain-products rates under that particular item. The carriers do not, in all instances, apply distances figured via the shortest available routes. In some cases they may have authority for abnormal situations such as these, and if so they ought to be explained.

Sometimes commodity items are general in terms and one carrier, for example, may be applying a rate on "Machinery and Machines, N.O.S.," while other carriers take the position that specific items on "Road Rollers, Self-propelled" should be applied instead of the machinery item. Occasionally, discussion of the application of rates used in comparisons develops that certain traffic is being overcharged or undercharged, in violation of Section 6 of the Act.

Similarity or Dissimilarity of Traffic and Transportation Conditions. In the *Jackson Traffic Bureau Case*^① the Commission held that merely showing the rates on other articles, without also demonstrating that they are com-

parable in other respects, such as value, average loading, and risk of loss and damage, is not convincing in determining the reasonableness of rates.

The principle is well established that a mere comparison of rates, without supporting evidence showing the similarity, or dissimilarity, of the transportation conditions, is of little probative value.^①

Conditions Compared. Traffic and transportation conditions, used in connection with comparisons of rates, mean more than the abstract characteristics of value, loading, risk, and weight per cubic foot. The witness who offers the comparison should be familiar with the rate structure, the territory, the way the tariffs are published, constructed, and applied, and the topographical conditions. Thus, in comparing rates on coal from the Kentucky fields to Spartanburg, S. C., with the rates from the same fields to Sandusky and Toledo, Ohio, there is no need to testify with respect to the value, average loading risk, and weight per cubic foot. These factors remain constant for coal rates in general. The witness should, however, be familiar with the topographical conditions, in that the haul from the Kentucky fields to Spartanburg must pass over the mountain ranges, whereas the haul northbound to the lake ports is much more free from operating difficulties on the first portion of the movement, and is through practically level country for a large part of the haul.

Rate Basis and Application. The witness should also be thoroughly conversant with the method in which the rates to the lake ports are made and applied. He may be using rates to Sandusky and Toledo which apply only on coal destined to move by lake steamer from the ports, and find that these rates are about 80 per cent of the rates which apply on coal destined to Sandusky and Toledo for local consumption.

^① *Universal Paper Bag Co. Case*, 88 I.C.C. 593, 596.

Another condition which the witness should be familiar with is the fact that it is generally regarded as proper to maintain rates through Central Freight Association Territory on a lower level than the rates from Kentucky to South Carolina points, on account of the greater traffic density in Central Freight Association Territory than in Southern Classification Territory.

Dissimilar Conditions. Similarity of transportation conditions must be shown in instances where the witness is offering one rate as a fair measure of the rate assailed. However, this is not the sole manner in which comparisons may be used. If the rate from the Kentucky mines to Sandusky showed higher revenues per ton-mile, per car-mile, and per car, than the rate from the Kentucky mines to Spartanburg for a like distance, the complainant, if located at Sandusky, would want to show that the transportation conditions to Spartanburg were unlike those to Sandusky. By showing the dissimilarity of the topography he could lay a foundation for the fact that the rates to Sandusky ought to be lower, mile for mile, than the rates to Spartanburg.

When a rate comparison is made by a complainant as being a fair measure for the reasonableness of the rate assailed, the defendants' witnesses often break down the comparison by a showing of unlike conditions. And, in turn, when comparisons are offered by the defendants as a fair measure of the rate assailed, to show that the rate is not in excess of a maximum reasonable rate, an experienced traffic manager for the complainant is able to point out to his attorney all of the inherent weakness in the defendants' comparisons so that the value of the defendants' comparisons likewise can be impaired by cross-examination.

Traffic and Transportation Characteristics of Commodities Compared. In drawing comparisons between the rates on one commodity, and the rates on another com-

modity, the witness should have a practical knowledge of the method of handling, packing, loading, unloading, and delivery of both articles. For example, in comparing the rates on marble with those on crushed rock for road-building purposes the witness should know whether the handling of marble requires much more care than the handling of crushed rock; whether the marble requires bracing in the cars to prevent chipping and breakage; whether the same kind of equipment is used for each; and whether the method of loading the crushed rock and the dumping of it into cars, damages the cars more than the stowage of marble.

In comparing the rates on butter with the rates on cheese the witness should be familiar with the peculiarities of each, such as the tendency of cheese to impart an odor to certain other classes of freight shipped in mixed carloads with it, or shipped in the same car after the cheese has been unloaded. He should know whether it is practicable to ship butter in the same car with cheese.

In comparing the rates on poultry with those on hogs, the witness should have a practical knowledge of the differences in construction of the double-decked livestock cars and the patented poultry cars. He should know the federal laws with respect to the inspection, transportation, feeding, watering, and drenching in transit of the different kinds of meat animals and poultry.

These illustrations serve to show why it is necessary for the witness to have a practical knowledge of the salient characteristics of the services performed in connection with the transportation of different articles of commerce.

Absence of Competitive Influences. One of the most frequent methods employed by the defendants in breaking down the probative value of comparisons offered by shippers, is a showing, in connection with the history of the compared rate, that it was established to meet the competition of other rail or water lines. In many cases

the carriers are able to show, from decisions of the Commission, that the compared rate has been recognized by the Commission as being less than a maximum reasonable rate, and that it has been established on a relatively low basis to meet carrier competition. Sometimes they show that the compared rate was reduced in order that a shipper or shippers on their lines might be able to reach a competitive market to which other carriers published reduced rates from other points of origin. In drawing a comparison between rates the shipper's witness should take care that the compared rates cannot be shown to be depressed by water or carrier competition.

Competition As Viewed by the Commission. The Commission has long recognized that competition is an important element in considering comparisons of rates for the purpose of determining reasonableness. In the *Corporation Commission of North Carolina Case*,^① the Commission said, "Competition has no doubt affected rates to points on the main line of the Norfolk & Western, but as we see it this competition has to no considerable extent been reflected to points south." In the *Elem Coal Co. Case*,^② the Commission found that "even complainant's rate is depressed by this water competition." This latter finding indicates very clearly the fact that the complainant, in drafting his complaint, did not realize the importance of being able to show that there was an absence of competitive influences even in the rate assailed.

PRACTICAL APPLICATION

Problem. In a complaint alleging the unreasonableness of a rate of 44 cents per 100 pounds on rough granite in blocks from Salida, Colo., to Keokuk, Iowa, via Denver & Rio Grande Western Railroad to Denver and Chicago, Burlington & Quincy Railroad beyond, a distance of 1,061 miles, the complainant referred to a rate of 24 cents on the same commodity from Mountain Park, Okla., to Keo-

^① 19 I.C.C. 303, 310.
^② 80 I.C.C. 647, 650.

COMPARISON OF RATES

kuk over the St. Louis-San Francisco Railway to Kansas City and Chicago, Burlington & Quincy Railroad beyond, a distance of 765 miles. The ton-mile yield for each haul was 8.29 mills and 6.26 mills, respectively. How would you disprove the value of this comparison, if you were representing the carrier, on the basis of transportation conditions?

Solution. Transportation and operating conditions are controlling factors in this case. The Denver & Rio Grande Western Railroad, the initial line, traverses a mountainous territory where operating conditions are unusual and difficult. Therefore, the ton-mile yield over the route shipment moved may well be somewhat higher than earnings for a haul through level country. The facts shown are similar to those in the *Cameron, Joyce & Schneider Case*, 120 I.C.C. 129.

Chapter II

INTRASTATE AND OTHER RATES AS MEASURES OF REASONABLENESS

ALTHOUGH many kinds of rates are available for comparisons in proving reasonableness or unreasonableness under Section 1 of the Act, not all of them are fair measures of the rate or rates in issue. There are well-defined characteristics of certain rates which sometimes disqualify them as legitimate bases of comparisons in rate cases. The party offering a comparison should know of these limitations and choose only those rates which will withstand the most severe attacks and criticism of the opposing party. For example, he should be able to decide such questions as whether an intrastate rate can be a proper measure of an interstate rate, whether a "paper" rate offers a proper basis of comparison, and whether a rate carrying one minimum weight may properly be compared with a rate carrying a different minimum. These and other questions which arise frequently in rate comparisons are discussed in this chapter with a view to pointing out their effect upon the grounds of proof in Section 1 cases.

Intrastate v. Interstate Rates. Prior to the World War and the period of Federal control of railroads there was a general feeling in interstate commerce practice, that the intrastate rates formed an improper and unreliable measure of comparison for the determination of reasonable interstate rates. Theoretically, this feeling had no proper place in our system of dual regulation of carriers, but in actual practice the feeling was prevalent and often found expression in interstate cases. It was said that the intrastate rates were "depressed" by the various state com-

missions in order that each state might have a lower basis of rates than existed on interstate traffic or on traffic within adjoining states. In some instances subsequent events tended to prove that such conditions actually existed, but it would be unfair to the state commissions of the nation as a whole, to say that this was generally true.

One particular instance was brought to light in the so-called *Shreveport Case*, in which the Commission issued an order requiring the removal of undue prejudice against interstate commerce from Shreveport to Texas points, on the one hand, and undue preference of intrastate commerce within Texas, on the other. This order was based upon findings that the interstate rates were not unreasonable, and, indirectly, that the intrastate rates were too low and should be raised to the interstate level. The Supreme Court of the United States affirmed this power of the Commission. Later, Congress amended the Act, giving the Commission broader statutory powers to correct situations of this kind.^①

During Federal control the Commission had jurisdiction over intrastate as well as interstate rates of carriers under Federal control, and during this period passed upon the reasonableness of many intrastate rates. Prior to Federal control, however, it was generally conceded that the citation of an intrastate rate was not a fair measure of comparison in determining the reasonableness of an interstate rate. In fact, in numerous instances, the fact that a rate was an intrastate rate, prescribed by a state commission or a state legislature, raised a rebuttable presumption of fact that it was on a lower level than contemporaneous interstate rates for like distances.

Intrastate Rate Comparisons since Federal Control. Subsequent to the period of Federal control, and the amendment of Section 13 of the Act, there has been a more co-ordinated effort to place the interstate and intra-

^① Section 13, paragraph (4), Amendment of February 28, 1920.

state rates upon a common level. This work is progressing through co-operation between the state and Federal commissions and it is now only a matter of time until the wide disparities between interstate and intrastate rates, which formerly existed in many instances, will practically disappear.

Since Federal control, many scales of rates on important commodities prescribed by the Interstate Commerce Commission for interstate traffic, have, by the co-operation of several state commissions, been made applicable on intrastate traffic as well. In the future we may expect to find, in such cases, that citation of intrastate rates will have equal weight with citations of interstate rates on those commodities.

Caution Necessary in Making Comparisons. The witness offering comparisons of intrastate rates with interstate rates should be sure to select intrastate rates which are on the same general level as the interstate rates on the same commodity. Otherwise the value of the comparisons may be destroyed by the mere fact of their being intrastate rates.

Another reason why intrastate rates should be used only after careful consideration of their merits as comparisons under an allegation of unreasonableness, is that it is no part of the Interstate Commerce Commission's duty to pass upon the reasonableness of intrastate rates, except in so far as they may be unduly prejudicial in substantial degree to persons or localities engaged in interstate commerce.^①

Where the intrastate rate has been established by a state commission, but not in co-operation with the Federal and other state commissions, the Interstate Commerce Commission has frequently held, as in the *Waco Freight Bureau Case*,^② that the state-made rate affords

^① *Oklahoma Corporation Commission Case*, 80 I.C.C. 607, 617.
^② 19 I.C.C. 22, 26.

little value for comparative purposes. This case reflects the general prevailing attitude with respect to intrastate rates prior to Federal control. Until this attitude is changed by future decisions of the Commission, the safest rule to follow with respect to cases involving the reasonableness of interstate rates, is to omit any and all comparisons with intrastate rates.

The Interstate Commerce Commission has never recognized that it is bound in any manner by the decisions of state commissions.^①

Expenses of Carrier. In making comparisons, particularly of short-haul rates, the complainants are often faced with testimony on behalf of the carriers that the rate cited by way of comparison is unlike the rate assailed in that the carriers have to absorb certain costs, for example, terminal or switching charges, which, when deducted from the aggregate revenue per car, makes the net revenue per car inadequate to cover the cost of transportation. In some instances the carriers have been able to show that the special expenses which they have to absorb in connection with terminal switching, per diem for idle cars, and the like, practically equal the revenue which they derive from that particular traffic. Obviously, the trained traffic manager must acquaint himself with conditions of this kind before he attempts to use a rate for comparative purposes.

Volume of Traffic. In comparing one rate with another the witness should be familiar with the volume of movement under each. One of the most common objections to proffered comparisons is that there is no actual movement under the rates cited. Generally a witness should be prepared to testify that the movement under the rate assailed is comparable with the movement under the rate offered in comparison.

^① *Railroad Commission of Wisconsin Case*, 16 I.C.C. 85, 89.

The Commission has repeatedly rejected as having no weight, the comparison of rates under which there is an actual movement with rates under which there is no substantial movement.

“Paper” Rates. When it develops that the compared rates are never used for actual shipments, they are styled “paper” rates; that is, rates which merely exist in the tariffs, but which are not employed on the movement of any actual shipments. The experienced traffic manager scrupulously avoids including “paper” rates in the exhibits which he prepares to show comparisons of rates.

Traffic Density. A comparison of the general level of a rate structure in one territory with the general level upon the same commodity in another territory, should be supported by statistics from the annual reports of the carriers showing the relative traffic density in the two areas. When a heavy-moving commodity such as coal, salt, or lumber is under consideration, an attempt should be made to place in evidence statistics showing the volume of production in one territory as compared with another. The carriers' annual reports to the Commission may be relied upon to supply valuable statistics with respect to the most important classes of heavy-moving freight traffic.

Value and Grade of Commodities. In comparing the rates on different articles, the value of each should be stated since it is given due weight by the Commission. In many instances comparisons are offered between such commodities as coal and lumber and neither shippers nor carriers develop in the record any definite figures showing the differences in average value. The rates on lumber cover so many different kinds of forest products and manufactured or partly manufactured articles, that it is difficult to give a general average value per carload of lumber, but nevertheless, some idea of the differences should be developed. A mere statement to the effect that

the value of a carload of lumber is ordinarily higher than the value of a carload of coal, while a matter of common knowledge, is too indefinite to have much probative value in determining the reasonableness of the rates on coal in comparison with those on lumber.

The witness making comparisons of rates on lumber and forest products should be informed of the character of the commodities upon which the rates used in his exhibits apply. For example, he may use a rate and find, upon direct evidence offered by defendants, that the cited rate applies only on hardwood lumber of high value, whereas the rate in issue applies on and covers actual movements of pine lumber.

In comparing rates on coal the witness should compare rates on the same grade or grades of coal. In many instances the rates on bituminous coal differ according to the prepared size, such as lump, egg, pea, nut, slack, and run of mine, and these, in turn, are upon a different level than the rates on anthracite coal. In other instances there may be no distinction in the tariffs between the different grades or sizes of bituminous coal from and to certain points, but there may be different rates on "bunker" coal or "export" coal than on "domestic" coal.

The subject of graded rates based upon differences in value is discussed in the preceding manual in connection with released rates under the Cummins Amendment.

Minimum Weights. In comparing the rate on one article, subject to one carload minimum weight, with the rate on another article, subject to a different minimum weight, some means of adjusting the differences in minima should be devised, if practicable, in order to make a fair comparison. If two commodities are fairly comparable in all other respects and the minimum on the rate assailed is higher than the minimum governing the compared rates, this might be employed as a fair means

of comparing the reasonableness of the carload minimum weight itself, but might have practically no probative weight with respect to the reasonableness of the rate. If the actual average loading of the two comparable commodities is practically the same weight, and if this average greatly exceeds the differing carload minima on the respective commodities, then the question of carload minima has no probative value and may as well be omitted from the evidence.

If the rate on a particular commodity from one point of origin takes a higher minimum weight than the rate on the same commodity from another point of origin, and the practice is to load not more than the required minima, then the showing of the difference in minima becomes important as bearing directly upon the measure of the rate from one point, as compared with the rate from the other.

Relevant Information. In offering comparisons the witness should always cite the tariff authority for the rates compared and state the minimum weight which governs the carload charges. The witness should also point out any variation in minima, and whether the minimum applies on cars of all lengths, or whether it applies on the standard car, subject to Rule 34 of the Consolidated Freight Classification, which provides graduated minima for cars of different lengths.

In Excess of Physical Capacity of Cars. In drawing comparisons care should be taken to include no rates which are subject to minima in excess of the physical capacity of a standard car, for the Commission has held that it is unreasonable to base transportation charges on a minimum weight which cars are incapable of loading.^① If the rate assailed is subject to a carload minimum which

^① *Classification Ratings on Radio Sets Case*, 102 I.C.C. 140, 144; *Armour Grain Co. Case*, 58 I.C.C. 306, 309; and *United States Graphite Co. Case*, 88 I.C.C. 157, 159.

cannot be loaded in standard cars, this fact should form a part of the allegation of the complaint and there should be a specific attack upon the existing minimum and a prayer made for the establishment of a reasonable lower minimum.

When rates used in comparisons differ for varying minima, this fact should be fully explained by the witness.

As Part of Rate. While an extended discussion of the subject of minimum weights cannot be made under the subject of rate comparisons, attention may be briefly directed to the fact that the Commission has frequently held that the minimum weight is a part of the rate, and as such, enters into the determination of a reasonable rate. This doctrine was carried to a rather unusual extreme in the *Swift & Co. Case*,^① in which the Commission said that while it was true that the minimum on sheep and lambs appeared to be excessive, it must not be overlooked that it was a part of the joint rate found reasonable. Perhaps this extreme view was due to the fact that the rates on livestock from the West to eastern markets are, in most instances, the same on cattle in single-decked cars as on hogs, sheep, and lambs in double-decked cars, although the minimum weights on cattle differ from those on hogs, and the minimum weights on hogs differ from those on sheep.

Based upon Marked Capacity of Car. Some heavy-loading commodities may be loaded in excess of the marked capacity of the cars furnished. These commodities sometimes enjoy commodity rates with a carload minimum weight based upon the marked carrying capacities of the cars furnished. When this is the case the fact should be mentioned as a factor in support of the contention that the high minimum warrants relatively low rates. The fact that the commodity will yield revenues per car

based upon a weight not less than the car can safely bear, is entitled to probative weight in testing the reasonableness of the rate.

Carriers' Operating Rules. Ordinarily the carriers' operating rules play no part in the determination of what is a reasonable rate for the reason that the Interstate Commerce Commission has no jurisdiction over the physical operations of the railroads. That is, the Commission has no control, whatsoever, over the time schedules of freight and passenger trains; over the tonnage ratings of engines; or over the personnel of the operating department, except in so far as may indirectly result from the enforcement of the hours of service and safety regulations under the Block Signal Resolution, Boiler Inspection Act, Hours of Service Act, Safety Appliance Act, and the Transportation of Explosives Act.

In certain classes of cases carriers and shippers present complete detailed explanations of the entire transportation services and movements, from the time that the empty car is ordered until the car is unloaded and released at destination. In such cases it is necessary that the witnesses become familiar with the operating rules and regulations governing the particular class of traffic in question.

One simple illustration suffices to indicate the kind of operating rules which may be relevant in the determination of reasonable rates. The livestock trains from the Chicago district to the east usually are called "specials." Respecting these the carriers have rules regulating the number of cars per train, the time of acceptance of loaded cars, the designated scheduled stops for feed, water, and rest according to the Federal laws, and the like. Usually, instructions are given that so-called "dead" freight must wait on passing tracks to permit the livestock trains to make their schedules. The fact that livestock is accorded the right of way over dead freight,

and sometimes even over passenger trains, has a direct bearing upon the costs of the transportation services rendered that particular class of traffic and is therefore relevant in proving the reasonableness of the rates therefor.

Long-and-Short-Haul Clause Influence. In rate-case hearings, it is not uncommon to find that a rate offered in comparison by complainant, has been the subject of a Fourth Section application proceeding, and that the Commission has recognized it as a "depressed" rate, due to water or market competition. If the Commission has granted authority to the carrier to continue that rate in effect while maintaining higher rates to intermediate points, then, obviously, the rate is not a fair measure for the reasonableness of other rates. Ordinarily, it is quite easy to recognize such rates and to avoid their use, if desirable, for the tariff in which the "depressed" rate appears should show on its face reference to the authority, granted by the Commission, to continue higher rates at intermediate points.

Rates to Intermediate Points. When the rate to a common junction or rail-competitive point of two or more lines may be applied over circuitous routes, the rate to an intermediate point on the circuitous route may, under the circuity provision of Section 4 of the Act, be held down by the competitive rate to the farther distant junction. This point is more fully explained in connection with rates to intermediate points on circuitous routes, in the following manual, the third one on GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION. However, whether such a rate to an intermediate point on a circuitous route is a fair measure of reasonableness of other rates, is debatable. The circuity provision apparently casts a presumption that the rate to such an intermediate point is the maximum reasonable rate which can be charged to that point. However, if the rate over the short route to the competitive point should also be de-

pressed, for example on account of water competition, then there would be no presumption of unreasonableness attaching to either rate.

The fixing of maximum rates at intermediate points by the Commission, in proceedings arising in connection with Fourth Section applications, can not be considered as a finding that such rates are maximum reasonable rates when considered apart from the depressed rates to the competitive points. While rates prescribed to intermediate points in such proceedings should be given due weight, they are not controlling.^①

PRACTICAL APPLICATION

Problem. The Southern Railway proposed to increase its local interstate rates on tanning extract in carloads from Lynchburg, Va., to Norfolk, Va., from 19.5 cents to 28 cents. The intrastate rate on this traffic was also 19.5 cents. The short line distance is 204 miles and is via the Norfolk & Western. The Chesapeake & Ohio Railway also serves these points, its route being 221 miles long. The Southern Railway also has an intrastate route of 309 miles, but the shortest distance over its system is 271 miles and is through the northern part of North Carolina. It is shown that there is no movement of tanning extract over the intrastate route. Protestants, the Traffic Bureau of Lynchburg in opposing the increase, stressed the fact that the Southern Railway's intrastate rate was 19.5 cents whereas under the proposed adjustment the interstate rate would be 28 cents.

Do you consider this comparison sufficient to prove the unreasonableness of the proposed rate of 28 cents?

Solution. The mere existence of the lower intrastate rate, upon which no tanning extract moves, has little or no probative value. The comparison, therefore, is not sufficient to prove the unreasonableness of the proposed rate.

^① *Mobile Chamber of Commerce Case*, 57 I.C.C. 605, 609; and *Montgomery Chamber of Commerce Case*, 57 I.C.C. 610, 619.

Chapter III

COMPARISONS OF LIKE KINDS OF RATES

THE Commission has said that "rates and fares of the same kind should be compared with one another; that is, transshipment rates should be compared with transshipment rates; proportional rates with proportional rates; excursion fares with excursion fares; and commutation fares with commutation fares."^① While this conference ruling, when announced, applied specifically to the interpretation of Section 4 of the Act, it has been followed consistently in rate comparisons in determining reasonableness.

The principle applies where the comparisons are intended to be of analogous, or "like" units. The best measure of comparison for a local rate is a local rate; for a joint rate, other joint rates; and for a proportional rate, other proportional rates. Similar procedure is applicable in connection with import, export, all-rail, water-rail, lake-rail, and rail-water-rail rates. Likewise, for class rates the best measure of comparison is other class rates of the same class, and for a commodity rate, other rates on the same commodity, or strictly analogous or fairly comparable commodities.

Unlike Rates Sometimes Used. Occasionally, a very effective comparison can be made by employing the negative of this principle. For example, if the rate on fresh meats from Chicago to Atlanta were assailed as being unreasonable, and the complainant could show that the proportional factor of the through rate for the haul south of the Ohio River Crossings was much higher than the local rate from the Ohio River to Atlanta, and that the local

^① Conference Ruling No. 304.

rate from the Ohio River to Atlanta had been prescribed by the Interstate Commerce Commission, the contrast between the proportional and the local rate would be emphasized very strongly. If the factor from Chicago to the Ohio River was a joint-class rate, the fact that the proportional south of the river exceeded the local south of the river, would create a very strong presumption that the proportional south of the river was unreasonable.

Local Rates. When local rates are compared with local rates, care should be exercised to avoid confusing the uses to which the term "local" is applied. In its simplest sense it means the rate from one point of origin to one point of destination over one line of railroad. However, the term is also applied to rates originating at a certain point, as distinguished from rates applicable on traffic originating beyond that point. In the latter sense the local rate may be a joint rate, or a combination rate.

In the illustration above, for example, the proportional rate for the portion of the haul south of the Ohio River to Atlanta, is contrasted with the local rate from the Ohio River crossings to Atlanta, meaning the rate applicable on traffic "originating" at the Ohio River points. The rate from the Ohio River to Atlanta may apply over one line from one crossing, and in this instance it would be strictly a local rate. On the other hand, it may apply over different combinations of lines from other Ohio River points, and if so, it might be a joint rate or combination.

Joint Rates. In comparisons of local rates under distance scales, it occasionally happens that the scale provides arbitraries to be added to the single-line scale when the route is comprised of more than one line of railroad. Care should be taken in employing comparisons under such scales, to select points from and to which there is a single line, if the rate assailed is via a single line, and to select points from and to which there are joint-line hauls, if the rate assailed is via a joint-line haul. Where a single-line scale, which provides arbitraries for joint-line

hauls, is employed the rate exhibits must show definitely whether each rate used in the exhibit is based upon the single-line scale, or if the joint-line arbitraries are included.

The term joint rate, in a strict sense, means a rate from and to certain points, which applies over more than one line of railroad and is published as a single rate applicable over the combination of lines comprising the through route.

Differences between Single and Joint-Line Rates. The principle underlying a difference in rates for single-line and joint-line hauls, is that—

One carrier can haul a unit of a certain commodity a given distance cheaper than if one carrier performs one part of the road-haul service and another carrier performs the balance of the road-haul service.

This principle has special application to rates for comparatively short distances. Where the length of haul approaches 400 to 500 miles, there is little or no difference, for one line of railroad would have changes of trains, and changes of crews, which would not be unlike the transfers to another line of railroad at an intermediate junction.

The Commission has frequently held that for longer distances the reasons which warrant joint-line arbitraries disappear and that the rates should be the same for joint-line as for single-line hauls. Just where the arbitraries should disappear cannot be definitely fixed. The later doctrine with respect to joint-line arbitraries is that the rates should take into consideration the average conditions within a given territory, and that the rates for substantial hauls should be based upon the average conditions so that there will be no necessity of making different rates for single-line, than for joint-line, hauls. In the *Southern Class Rate Investigation*,^① the Commission, after indicating the views of the parties towards the elimination of complications due to joint-line arbitraries, found,

^① 100 I.C.C. 513, 628, Conclusion No. 7.

"That no sufficient reason has been shown for joint-line differentials or arbitrariness but the absence of such differentials is a factor which should be given some weight in determining the level of the distance scale." The Commission was there dealing with a scale of class rates to be used for single line, or local application as well as for joint-line application.

When commodity rates are published on a specific basis from certain points of origin to certain destinations, or from large groups of origin to large groups of destinations, it is not customary to make any differences in rates due to the differences in the number of lines that participate in the routes. Nevertheless, if the rate assailed is for a not-long haul over one line of railroad, and there are lower rates for like distances between other points, over routes consisting only of more than one line, this fact may be cited as having some weight or bearing upon the reasonableness of the rate assailed.

Proportional Rates. The Commission has defined^① a proportional rate "as one which applies to part of a through transportation which is entirely within the jurisdiction of the act to regulate commerce; that is, the balance of the transportation to which the proportional rate applies must be under a rate filed with this Commission. A rate to a port for shipment beyond by a water carrier not subject to the provisions of this act would not be a proportional rate. (See *Crescent Coal & Mining Co. v. C. & E. I. R. R. Co.*, 24 I.C.C. 155.)"

This definition is inaccurate and is somewhat ambiguous. If it means that the through transportation must be entirely within the jurisdiction of the Commission, and this is the way it must be interpreted under the illustration given in Conference Ruling No. 304, then the Commission's definition cannot be reconciled with the definition of a proportional rate contained in the Interstate

^① Conference Ruling No. 304 (b).

Commerce Act itself. The Act, Section 6, paragraph 13 (c) defines a proportional rate as follows: "By proportional rates are meant those which *differ from the corresponding local rates* to and from the port, and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."^① The italics are the author's. Space will not permit further elaboration of this question here, other than to point out the difficulties which may, in some instances, be experienced in determining whether a rate is a proportional rate.

Tariffs Indicate Nature of Rates. Ordinarily, the tariffs show on their title pages whether the rates contained therein are local, joint, or proportional. Often the title-page shows that the tariff contains all three kinds of rates. Reference must then be made to the specific wording of each item in order to determine which rates are in fact proportionals, and which are locals.

Occasionally rates are made specifically to apply as proportionals on traffic from or to certain points and not to others, and, at the same time, there may also be specific authorization for the use of the same rates on local traffic. For example, a rate from Davenport, Iowa, to New York, N. Y., on cattle and hogs in double-decked cars, may be published to apply locally on traffic originating at Davenport and also proportionally on hogs originating in Iowa, but not on cattle originating in Iowa, and not on hogs or cattle originating in Missouri. In instances of this kind the rate might be used for comparison with local rates and it might be used, also, for comparison with proportional rates. In citing such rates, however, a clear explanation of the different uses of the rate should be made in order that the comparison may not be discarded as unfair. This particular instance shows that there must be something unusual about the rate, which would require

^① See also: *Baltimore & Carolina Steamship Co. Case*, 49 I.C.C. 176, 181.

further explanation, based upon a thorough knowledge of the rate structure on livestock from the west to the east.

Import and Export Rates. As a general rule rates on import and export traffic are made in contemplation of the fact that the rail haul does not include the usual delivery at destination of export shipments, or the usual terminal service at point of origin of import shipments. Ordinarily import and export rates are made lower than the corresponding local rates. The principal reason for this difference in rates is the matter of competition rather than the matter of services.

On many kinds of traffic special privileges and services are available in connection with export and import rates, which have no counterpart in domestic traffic. For example, at most of the ports from seven to ten days' free time is allowed on many commodities, whereas on domestic freight the free-time period for holding cars is limited to forty-eight hours. While there may be some services in connection with the receipt and delivery of freight to and from water lines for export or import, which may be less expensive than in connection with the delivery and receipt of domestic freight, whether the aggregate expense to the rail lines is less on import and export traffic than on domestic traffic may be seriously questioned.

Import and Export Rates v. Domestic Rates. In making comparisons of rates on domestic traffic, care should be taken not to use rates on import or export traffic. There is a presumption, although it may be disproved, that the carriers encourage export traffic as a matter of public policy, and likewise, and this also is rebuttable, that rail rates on import traffic are lower than maximum reasonable rates, for competitive reasons.

The Commission has frequently held that the mere fact that an export or import rate is lower than the domestic rate on like traffic from and to the same points, is not proof of the unreasonableness of the domestic rate, and

this view has been upheld by the Supreme Court of the United States. The carriers may make rates on import and export traffic which are different from those on domestic traffic, but the Commission is not warranted in making this distinction. There is nothing inherent in export traffic that necessitates fixing lower rates for it than on domestic traffic.^① However, the cases cited demonstrate the futility of offering comparisons of import and export rates to prove the unreasonableness of domestic rates.

Lake-and-Rail Rates. Rates published as joint rates by lake-steamer and railroad lines are comparable with ocean-and-rail rates, or rail-and-river rates, but not with all-rail rates. Frequent attempts have been made to employ a formula for the equation of water transportation into the equivalent rail transportation on a mileage basis, for example, three miles of water haul has been taken as the equivalent, in transportation costs, of one mile of rail haul. These equated water mileages, however, are arbitrary and unscientific. In certain classes of cases different equations have been employed by shippers, by carriers, and by the Interstate Commerce Commission, but none of them can be accepted as a fair index of relative costs.

The length of the water haul bears a distinct relation to the equation. That is, in comparing a short rail haul with a short water haul the equation might probably be one figure, whereas in comparing a very long water haul with a very long rail haul the equation probably should be entirely different. No extended discussion of the reasons for this variation of equated water mileages can be given here. However, enough has been said to indicate the difficulty of proving the reasonableness of rail rates by comparison with lake-rail or ocean-rail rates, or of measuring rail-ocean rates or lake-rail rates by all-rail rates.

^① *Lincoln Oil Refining Co. Case*, 88 I.C.C. 269, 271; *D. Nagase & Co. Ltd. Case*, 68 I.C.C. 539, 540.

Class Rates. The general instruction to compare class rates with class rates, is subject to numerous exceptions and the exceptions are in the preponderance. One of the reasons for this fact is that when a particular class rate is attacked as a class rate, it is almost impossible to show that it is unreasonable without showing that the entire level of all the class rates is unreasonable. For example, suppose that the complaint assailed the second-class rate on aluminum ware from a point in Ohio to a point in Indiana, to which there was only an occasional movement. As a practical matter it would be necessary to show that all of the class rates between these points were unreasonably high as compared with all of the class rates between other points in Central Freight Association Territory for like distances, or else that the entire level of class rates in this territory was too high. The enormity of such a task would, for all practical purposes, prevent the trial of a case upon such a theory.

The class rate on a particular article between points in Central Freight Association Territory could not fairly be compared with the class rate on the same article in another territory, subject to a different classification, for the reason that the ratings in the two classifications might be different and the level of the class rates in the two territories would, in all probability, be different.

Class Rates v. Commodity Rates. The most frequent class of cases involving particular class rates is that in which the complainant is asking for the establishment of a commodity rate less than the existing class rate. In other words, the most frequent instances of this kind occur where the complainant is attempting to substitute a lower rate than the existing class rate, on the ground that the volume of movement is so large as to warrant removing the article from the ordinary class-rate structure.

In this class of cases the proper method to employ is a comparison of the class rate assailed with commodity

rates between other points. In such instances the movement between the points where the commodity rates are in effect must be comparable to that between the points where class rates are charged. Thus it is seen that in cases involving particular class rates the most usual method of comparison is not with class rates, as might be presumed, but with commodity rates between other points.

In speaking of class-rate cases we have in mind cases involving the class rate and not the classification rating. When classification ratings are assailed and the complainant is seeking, not a commodity rate, but a lower classification rating, then comparisons of the class rate with commodity rates would be useless and would have no bearing upon the reasonableness of the classification rating itself.

Commodity Rates. The general rule that commodity rates should be compared with commodity rates, has widespread application. As the necessity for thorough knowledge of the commodity rates used for purposes of comparison has already been dwelt upon at some length, further explanation is not necessary.

Commodity Rates in Excess of Class Rates. Occasionally a commodity rate may be found which exceeds the contemporaneous class rates from and to the same points of origin and destination.

There is a presumption that a commodity rate, which exceeds the contemporaneous class rate, is unreasonable to that extent.

This presumption is based upon the fact that the reason ordinarily advanced for the establishment of commodity rates is that the volume of movement warrants something lower than the class basis. While the presumption is open to refutation and may be overthrown, the instances where commodity rates in excess of the class rates have been justified, are rare.

In the *Grain from Memphis Case*,^① the Commission said that it is unusual to find a commodity rate which exceeds the contemporaneous class rate. In the *South-eastern Sugar Cases*,^② the Commission held that the fact that a commodity rate is lower than a class rate raises no presumption that the commodity rate is subnormal, or less than a maximum reasonable rate. In the *Boston Wool Trade Assn. Case*,^③ the Commission held that the fact that commodity rates are higher than class rates that might otherwise apply does not necessarily prove that the commodity rates are unreasonable. These decisions indicate that there is no *conclusive presumption* of reasonableness attaching to commodity rates in their relation to class rates, whether higher or lower than the contemporaneous class rates.

PRACTICAL APPLICATION

Problem. The unreasonableness of rates on green salted hides, in carloads, from El Paso, Tex., to Chicago, Ill., St. Louis, Mo., Kansas City, Mo., and points basing their rates thereon, was alleged by the Peyton Packing Company. In the complaint filed with the Commission, a comparison of the commodity rates on agricultural implements, canned goods, coffee, glass bottles, iron and steel articles, vinegar, paints, soap, starch, and wheat flour from Kansas City to Fort Worth, Tex., was made with the rates from Kansas City to El Paso. This comparison showed the rates to El Paso to be from 14.5 cents to 24.5 cents higher than the rates to Fort Worth. All the southbound rates were shown to be on a higher level than the northbound rates on green hides on which the spread was 31.5 cents as between El Paso and Fort Worth.

Of what value is this comparison?

Solution. The mere showing of these differences in rates on unrelated commodities moving in opposite directions, without any showing as to the various elements affecting the southbound rates, falls far short of establishing any unlawfulness in the rates from El Paso or in their relation to the rates from Fort Worth.

^① 80 I.C.C. 141.

^② 48 I.C.C. 789.

^③ 78 I.C.C. 178, 185.

Chapter IV

TON-MILE AND CAR-MILE REVENUES AS FACTORS IN COMPARISONS

THERE would be no necessity of resorting to mathematical formulas for assistance in making fair comparisons, if rates for exactly similar distances could be found. In practice it is seldom possible to make a rate exhibit which presents a sufficient picture of the general level of rates on a particular commodity without employing distances which cover a considerable range. That is to say, if the distance between the points in issue is 257 miles, it is improbable that many comparable rates could be selected between points just 257 miles apart. In making up the rate comparisons it might be necessary to use various distances ranging say from 150 to 350 miles.

How then, can the mind grasp the relationship in rates where there are such differences in distance? Distance forms the variable element in most all rates, while the terminal expenses at origin and destination remain practically constant and more or less uniform. Therefore, in comparisons of rates on one commodity with other rates on the same or other commodities, the variations in distance must be reduced to some mode of expression which the mind can readily comprehend. Several mathematical formulas are employed for this purpose and the results are known as "ton-mile revenues," "car-mile revenues" and "carload revenues."

Ton-Mile Revenue. Ton-mile revenue is the rate per ton which the carriers charge to haul the commodity for each mile included in the total distance. The formula for determining the ton-mile revenue is applied to three different kinds of circumstances as follows:

(1) Where the rate is stated in amounts per ton, such as \$2.40 per ton, and the distance is, for example, 120 miles, the number of miles is divided into the rate per ton to obtain the rate per ton per mile, or ton-mile revenue. In this illustration the number of miles, 120, divided into the rate per ton, \$2.40, gives 20 mills, or 2 cents per ton-mile. Ordinarily, ton-mile revenues are stated in mills instead of cents.

(2) Where the rate is stated in cents per 100 pounds, such as 12 cents per 100 pounds for, say, 120 miles, the rate in cents per 100 pounds is multiplied by 20, to get the rate per ton. Thus, 12 cents times 20 equals \$2.40 per ton. The next step is to divide the number of miles, 120, into the rate of \$2.40 per ton and the result is the ton-mile revenue or, in this example, 20 mills per ton-mile.

(3) Where the rate is in cents per package, such as 6 cents per standard crate of vegetables, estimated weight 50 pounds, distance 120 miles, the first step is to reduce the rate per package into the equivalent rate in cents per 100 pounds.

In this example, two 50-pound packages make 100 pounds, hence the rate of 6 cents per package is equivalent to 12 cents per 100 pounds. This rate is then multiplied by 20 to get the rate per ton. Thus 12 cents times 20 equals \$2.40 per ton. The next step is to divide the number of miles into the rate per ton, and the result is ton-mile revenue, which in this example is 20 mills per ton-mile.

In the first illustration there is only one mathematical calculation, in the second there are two, and in the third, three. The second step in the second illustration and the third step in the third illustration are the same as the first step in the first illustration. The second step in the third illustration is the same as the first step in the second illustration.

Ton-Mile Revenue as Measure of Different Rates on One Commodity. Particular attention is called to the fact that ton-mile revenues are not affected by the carload minimum weight, the average loading, or the weight of the car itself. The ton-mile revenue is essentially a measure for relative distances only. For this reason its use should be confined principally to comparisons of different rates on a single commodity.

When confined to differing rates on just one commodity, the ton-mile revenue test is as good as any of the other forms of revenue tests, because where only one commodity is involved in the comparisons, the average loading, the value, the risk, and the special transportation characteristics, all remain constant. The same kind of equipment is used and the same ratio of empty to loaded mileage of cars obtains. There is therefore no necessity for using any other form of revenue test when comparing differing rates on *one* commodity, unless, under peculiar conditions, there is a difference in some of the other factors which go into the consideration of what is a reasonable rate. For example, if rates on aluminum manufactured articles from one point were attacked, and a comparison were made with rates from another manufacturing point which makes only a very heavy type of aluminum utensil, suitable for hotel kitchens, the difference in loading and value, between the ordinary aluminum articles manufactured at the complaining point and the hotel ware manufactured at the other point, might be so great as to warrant different rates. In this instance the ton-mile revenue would be almost valueless as a measure of comparison. The proper test would be the revenues per car-mile.

Ton-Mile Revenue Not Conclusive. When ton-mile revenue comparisons are used, several well-defined principles of rate making should be kept in mind. First, ton-mile revenues can not be regarded as conclusive evidence of the unreasonableness of any rates. They cannot be

made the sole test, even where the comparisons are made with only the commodity under consideration. There are numerous other factors which must always be taken into consideration.^①

Rates per Ton-Mile Decrease with Distance. Care should be exercised to see that the rates used in the comparisons do not cover too wide a spread in distances over and under the distance between the points under consideration.

One of the elementary principles of rate making in connection with revenues is that as the distance increases, the rates per ton-mile and car-mile should decrease.^②

Therefore, in comparing a rate for, say 300 miles, with a rate for 200 miles, there should be considerable allowance for differences in revenue per ton-mile due to the normal curve of decrease in revenues per mile for increasing hauls. However, if the rate assailed yields higher revenue per ton-mile for a distance of 300 miles than the compared rate for 200 miles, this comparison of unlike revenues would show, on its face, that some maladjustment of the rates existed, because the rate for 300 miles should, ordinarily, yield less per ton-mile than the rate on the same commodity for 200 miles under similar conditions.

On short-haul traffic, say from 20 to 50 or perhaps even 100 miles, the ton-mile test, has, as a rule, very little evidentiary value, for the reason that in short hauls the two terminal expenses usually outweigh in proportion the road-haul expenses.^③ Obviously, for a switching movement, the ton-mile test is of no value whatsoever.

A party making comparisons of revenues per ton-mile should be careful not to take rates from the farthest points or nearest points in group adjustments, according

^① *Muskogee Traffic Bureau Case*, 17 I.C.C. 169, 173; *Nebraska State Ry. Commission Case*, 28 I.C.C. 121, 125; *Excelsior from St. Paul, Minn., Case*, 36 I.C.C. 349, 363; *Decker & Sons Case*, 59 I.C.C. 67, 69.

^② *St. Joseph Lead Co. Case*, 101 I.C.C. 352, 354.

^③ *Boston Wool Trade Association Case*, 78 I.C.C. 341, 345.

as the one or the other may favor the party offering the exhibit. Manifestly, in a group adjustment, distance is in a measure disregarded, particularly with respect to the nearby and the far distant points in the group, and the ton-mile revenue is, necessarily, higher to or from nearer border-line points than to or from those farther distant.^①

Car-Mile Revenues. Where there are any differences whatsoever in transportation conditions between the article under consideration and the article used for comparison, the car-mile revenue test is the most reliable and is the one most frequently employed, particularly when different articles of commerce are compared.

The essential difference between the car-mile and the ton-mile tests is that the car-mile test, unlike the ton-mile test, includes the element of the loading, that is, actual carload weights, average weights per carload, or carload minimum weights. Since the car-mile test does take into consideration the carload weights it affords a measure of the revenue which the carrier receives for a carload, and the carload is the unit of transportation upon which carload rates are based. The ton-mile test affords no indication whatsoever of the revenue for the unit of transportation of carload shipments, and this is the vital shortcoming of ton-mile revenue comparisons.

Method of Determining. Car-mile revenue, then, means the amount of revenue which a certain carload rate will yield to the carrier for each mile included in the total distance that a commodity is transported. The formula for determining car-mile revenues is applied under three different sets of circumstances as follows:

(1) Where the rate is stated in amounts per ton, per 100 pounds, or per package, first determine the revenue per car, that is, multiply the rate by the average loading per car. For example, if the rate per ton is \$2.40 and the average loading is 20 tons, the rate multiplied by the load-

^① *Somerville Iron Works Case*, 102 I.C.C. 511.

ing equals \$48 per car. The next step is to divide the number of miles into the revenue per car. For example, if the distance were 120 miles, 120 divided into \$48, results in a car-mile revenue of 40 cents.

(2) If the rate were 6 cents per package, and the average loading were 800 packages, the carload revenue would be 6 cents times 800, or \$48, and the revenue per car-mile would be found by dividing 120, the number of miles, into \$48, resulting in a car-mile revenue of 40 cents.

(3) If the rate were 12 cents per 100 pounds and the average loading per car were 40,000 pounds, the revenue per car would be \$48 and the revenue per car, divided by the number of miles, 120, would produce a car-mile revenue of 40 cents.

In each instance there are only two mathematical calculations in determining car-mile revenues, and the calculations are the same regardless of the method of stating the rates. First find the revenue per car, then divide this by the total distance.

Comparisons on Different Commodities. Car-mile comparisons are particularly adaptable to the comparison of rates on different commodities which move in approximately the same volume, which are of the same general character in so far as value and risk are concerned, which have approximately the same average loading, and which move in the same class of equipment. Where these elements are not all present in more or less equal degree, certain mental allowances must be made for the differences in transportation characteristics. This kind of mental operation, when necessary, impairs the value of the comparisons.

This may be explained by an illustration. If a comparison were made between the rates on fresh meats and the rates on packing-house products, car-mile revenues would provide a much better test method than ton-mile revenues, as many of the transportation characteristics

of fresh meats are similar to those of packing-house products. Both move in the same trains, from and to the same points, in fairly comparable volume, and in the same class of equipment. While there are differences in value these are not so great as to be important. The risk in transporting fresh meats is greater, but even this might be disregarded. There is, however, one very important difference from a rate-making standpoint. The loading of fresh meats averages about 24,000 pounds, say, and the loading of packing-house products probably averages nearly 36,000.

Some rates, such as those from the Missouri River packing points to the Mississippi River, are the same on fresh meats as on packing-house products. Therefore, if the packing-house products average 36,000 pounds, and the fresh meats average 24,000 pounds, the revenue per carload of packing house products will be 50 per cent higher than the revenue per carload of fresh meats. This in turn will make the car-mile revenues on packing-house products much higher than the car-mile revenues on fresh meats. The question now arises: Is the car-mile revenue on packing-house products a fair method of measuring the rates on fresh meats, or vice versa?

Theory for Similar Kinds of Equipment. One of the fundamental theories of car-mile revenue tests is that, in the case of a certain kind of equipment, say the ordinary box car of standard length, the cost of transportation of a carload of packing-house products, for example, is not much greater or much less than the cost of transportation of a carload of fresh meats. Consequently, in order that the car-mile revenue on fresh meats may equal the car-mile revenue on packing-house products, the mathematical result will be much higher rates on fresh meats than on packing-house products. Thus, if the rate on packing-house products were 20 cents, the revenue per car of 36,000 pounds would be \$72 for, say 100 miles, a car-mile revenue of 72 cents. If it is true that fresh meat

ought to yield the same revenue per car-mile, then the rate would be 30 cents on fresh meats, or 50 per cent higher than on packing-house products. Multiplying this rate by 24,000 pounds results in a revenue of \$72 per car and for 100 miles, 72 cents per car-mile.

Opponents of this theory contend that it costs more to haul a car containing say, 36,000 pounds, than it does to transport a load of say, 24,000 pounds, and that therefore the rate on fresh meats should be no higher than the rate on packing-house products. This contention is founded upon the theory that the unit of the rate is the 100-pound basis, and not the carload basis.

There is a middle ground, somewhere between these two theories, that is more sound than either. An article which loads an average of 36,000 pounds should have a lower rate per 100 pounds than an article which loads an average of 24,000 pounds, but the carload revenues should not be the same on both. It costs something more to transport 36,000 pounds than it does to transport 24,000 pounds, and the transportation of 36,000 pounds is worth more to the shipper than the transportation of 24,000 pounds.

But, the rates on packing-house products ought not to yield 50 per cent higher carload revenues than the rates on fresh meats. The cost of transportation of carload freight does not increase in exact proportion to the weight of the car. The total transportation expense for the receipt, hauling, and delivery of a carload of freight weighing 20,000 pounds, is not much greater than the expense of the same car if it contained but 10,000 pounds.^① This middle ground is not susceptible of exact demonstration, nor can it be expressed in a mathematical formula or ratio.

Consideration Given to Average Carload Weights. In car-mile revenue comparisons consideration should be

^① Montague & Co. Case, 17 I.C.C. 72, 74.

given to the differences in average carload weights. The purpose of the illustration discussed above is to show some of the difficulties inherent in this method of rate-comparison. On the whole, it is doubtful whether any form of proof of reasonableness or unreasonableness of rates is more often used, or is given more weight by the Commission, than car-mile comparisons.

In *Investigation & Suspension Docket Nos. 26-26C*,^① the Commission, in considering comparisons of rates on coal, pointed out the "fallacy of placing reliance upon ton-mile earnings as a basis of rate making" and said: "As the Commission has heretofore found in many cases, a much fairer basis is that found in the earnings per car-mile and per train-mile. Much of the profitable freight carried by the railroads of the United States, and perhaps this might be made broader and it could be truthfully said that most of the freight which pays the carriers the best, is that which yields the lowest rate per ton-mile. This arises out of many facts which the traffic manager takes into consideration, the volume of traffic, the heavy load per car, and the regularity of movement. Some of the roads here concerned are among the most prosperous in the country, and yet their rate per ton-mile is lower than that of many which enjoy no such prosperity."

The Commission has frequently observed that car and car-mile revenues afford a more reliable guide than ton-mile revenues.^②

Gross-Weight Comparisons. Where comparisons are made, per ton-mile and per car-mile, between commodities which move in different kinds of equipment and which show a substantial difference in average loading per car, neither of these ordinary tests are adequate, and a different method should be employed. Perhaps the most valuable form of comparison, in instances of this kind, is what is known as "gross-weight" comparisons. This name

^① 22 I.C.C. 604, 620.

^② *Furniture from Southern Points Case*, 100 I.C.C. 127, 136.

is rather abbreviated and does not indicate the true extent of the formulas used in determining the comparisons. Gross-weight comparisons show, arithmetically, the relative revenues under rates on different commodities based upon the average loadings of each and average weights of the kinds of equipment used for each, together with allowances for average ratios of return movement of empty cars.

Often these gross-weight comparisons are used as a method of determining from the rate in effect on one commodity, what would be a relatively reasonable rate on another commodity from and to the same points. The comparisons may be made in terms of revenue per ton of gross weight of car and contents, or the same plus an allowance for the ratio of empty return movement; or may be expressed in terms of revenues per "gross ton-mile" or "gross revenue per car" or "gross revenue per car-mile." The constructive rates derived from such comparisons are expressed in the same terms as the rate used for comparisons. The term "gross," as used in connection with such comparisons, means the weight of the load in the car plus the weight of the empty car, and the distances used are ordinarily the distance in miles from point of origin to destination plus, in the event that the traffic under consideration involves a considerable empty-car movement, the number of miles determined by the ratio of empty return movement.

Defect in Gross-Weight Comparisons. One inherent defect in gross-weight comparisons is that differences in value and volume of tonnage are not taken into account. The comparisons assume that the general transportation conditions of the one commodity are approximately equal to those of the other commodity. The Commission has given gross-weight comparisons great weight in certain classes of cases, and has observed that, when properly founded, they are "entitled to evidentiary weight."^①

^① *Morrell & Co. Case*, 104 I.C.C. 104 115-117.

The formulas for making gross-weight comparisons vary according to the kinds of equipment used, and the nature of the transportation and other services, such as refrigeration. They require rather elaborate preparation and study of statistics and should be attempted only by the experienced traffic manager.^①

Comparisons with Revenue on All Freight Traffic. Another form of comparison more frequently used of late years is that between the ton-mile and car-mile revenues under the rates assailed and the average revenues per ton-mile and car-mile on all revenue freight traffic of a carrier, or of all Class I carriers within the United States or within a given territory. In connection with rates on coal the Commission gave consideration to the average revenues on all freight traffic in the *Traffic Bureau of Nashville, Tenn., Case*,^② but said that "where the commodity moves in trainloads the earnings per train-mile furnish the best criterion." In a later report in that case,^③ special consideration was given to comparisons of car-mile revenue on all freight traffic handled by the defendant. In the *Swift & Co. Case*,^④ consideration was likewise given to the comparisons per ton-mile and per car-mile with the average revenues "on all traffic of the respective carriers over whose lines the shipments moved."

Of course, the reasonableness of any rate cannot be gauged solely by comparing its revenues per ton-mile and car-mile with average revenue on all traffic. If this were used as the sole test the inevitable result would be to bring all rates to a common level.^⑤

^① Further advice and instruction upon this subject may be had by consulting the gross-weight exhibits of Witness Hargis, for Wilson & Co., in the *Morrell & Co. Case* cited above.

^② 28 I.C.C. 533, 535.

^③ 43 I.C.C. 366, 378.

^④ 62 I.C.C. 618, 625.

^⑤ *Swift & Co. Case*, 62 I.C.C. 618, 625; and *Indiakoma Refining Co. Case*, 74 I.C.C. 392, 393.

In the *Lafayette Box Board & Paper Co. Case*,^① the Commission said, with respect to a comparison between the revenues per 100 pounds under the rates on strawboard and the average revenue on all revenue freight in the Eastern District that "such comparisons, though frequently offered, throw little, if any, light on the reasonableness of rates on individual commodities."

While this doctrine is sound in connection with the commodity there under consideration in that case, and while the average revenues on all carload freight cannot be set up as an exact standard for the determination of the rates on every *commodity*, nevertheless, there are certain instances where comparisons of this kind induce a positive conviction with respect to the reasonableness of the rates assailed. For example, in a case involving the rates on crushed stone, for a haul of say, 400 miles, if the complainant can show that the car-mile revenues, under the rate assailed for this distance, are greatly in excess of the average car-mile revenues on all freight traffic in the same territory, the mind naturally jumps to the assumption that the rate is excessive because the stone, which is used for road-building purposes, must load very heavily, is of very low value, and is shipped in open equipment. It must naturally be assumed that the revenues for 400 miles on such a low-grade commodity ought to be considerably less than the average revenues on all freight, which includes commodities of high value, light loading, and great risk; and includes, likewise, less-than-carload as well as carload shipments.

The fact that this form of comparison is considered of probative value by the Commission, especially in connection with low-grade commodities which move in large volume, is borne out by the decisions cited above and by a more recent one, in which the Commission tabulated the revenues on coal in comparison with the averages on

all traffic for length of haul, revenue per ton-mile, car loading, revenue per loaded car, revenue per loaded car-mile, and revenue per loaded and empty car-mile.^①

Comparisons of Revenue Per Car. Revenues per car are, in some instances, the best test of the reasonableness of rates. In the *Northwestern Woodenware Co. Case*^② the Commission observed that comparisons of car earnings, on analogous commodities moving from the same point of origin to the same destinations, are "perhaps as fair a test of reasonableness of the rates in question as is obtainable under the circumstances. The evidentiary force of such comparisons has not infrequently been recognized. *Florida Fruit & Vegetable Shippers' Assn. Case*, 14 I.C.C. 476, 489, 490; *In Re Advances on Coal*, 22 I.C.C. 605, 620."

PRACTICAL APPLICATION

Problem. Complainant, Fletcher-Wilson Coffee Company, dealing in coffee at Montgomery, Ala., a point on the main line of the Louisville & Nashville Railroad, alleges that the rate of 48.5 cents on green coffee from New Orleans, La., to Montgomery, Ala., a distance of 318 miles, is unjust and unreasonable. In support of its contention it shows the following mileages and rates from New Orleans:

To	Miles	Rate
Jackson, Miss.	184	36 cents
Meridian, "	202	36 "
Natchez, "	214	36 "
Vicksburg, "	235	36 "

The carrier showed that the rate attacked yielded ton-mile revenues of 30.5 mills, whereas the 36 cent rate from New Orleans to Jackson yielded 39.1 mills and the rates to the other three points shown, yielded ton-mile revenues of 34.4 mills for an average distance of 209 miles. What principle should be considered in determining the value of this comparison of ton-mile revenues?

Solution. Consideration should be given to the recognized principle that ton-mile revenues decrease as distance increases, and when this is considered the rate to Montgomery, under attack, does not appear to be seriously out of line.

^① *Lillie Mill Co. Case*, 102 I.C.C. 67, 69. A contrary view is indicated in the *Union Sulphur Co. Case*, 98 I.C.C. 76, 79.

^② 28 I.C.C. 237, 240.

Chapter V

THE NATURE OF THE TRANSPORTATION AS A FACTOR IN RATE COMPARISONS

THE railroad freight transportation service of the United States is conducted under such diverse circumstances, depending upon the nature of the commodity being transported, that the party offering a rate comparison must be prepared to show that the conditions under which the commodities are moved, are sufficiently similar to afford a fair basis of comparison. Certain characteristics of commodities which commonly affect the conditions surrounding their transportation and determine their usefulness in rate comparisons, include such factors as the average loading, the kind of equipment and service required, the susceptibility of the articles to damage from heat or cold weather, and the direction and regularity of movement. These factors are discussed in this chapter with a view to demonstrating their importance in selecting and presenting rate comparisons as proof of reasonableness or unreasonableness under Section 1 of the Act.

Relative Loading. In comparisons of rates on two commodities consideration must be given to the relative loading. If the article in question loads more heavily than the article used for comparison, and the rate on the article in question is higher than that on the article used for comparison, this difference in loading makes the comparison more marked. On the other hand, if the article in question does not load as heavily as the article used for comparison, then some compensation for the difference should be made in the comparison. Gross-weight comparisons would answer this purpose.

In certain instances commercial conditions may require that cars be loaded so as to utilize only a small portion of the capacity of the car, while other shippers may be able to handle full carloads. In such cases there may be two rates on the same commodity between the same points, a higher rate based upon a lower carload minimum and a lower rate based on a higher carload minimum. When such rates are used in comparisons care should be taken to explain the alternate rates subject to different minima.

Carload Minimum Weight in Comparisons. In some instances the carload minimum is practically the equivalent of the actual average loading. In making car-mile comparisons, using carload minimum weights instead of actual average carload weights, the witness should explain whether the weight used represents the actual average loading as well. The cases where the minimum is the equivalent of the actual loading usually involve light and bulky articles, such as furniture, and empty boxes, set up. The average loading of these may be even less than the carload minimum. In such instances the comparisons should be based upon the carload minimum for the reason that the revenue per car cannot be less than the rate multiplied by the carload minimum weight.

The comparison of commodities which load very heavily with those which load very lightly should be avoided, but, occasionally the comparison of "unlikes" may be made even stronger in probative force than "like" rates, as hereinbefore explained.

Classification Rating Cases. In cases involving the reasonableness of classification ratings the "loading" capabilities of the commodity are of primary importance. In addition to a showing of the actual average loading, the weight per cubic foot should be shown, and the method of loading into cars.

Class-Rate Cases. In class-rate cases, or in cases where the rates involve a commodity which is generally shipped

to and from practically all points, such as canned goods, it is not sufficient to give the average loading of a particular shipper. Statistics should be compiled representing the general average actual loading throughout a given territory. One shipper may load a commodity very heavily whereas the general average carloading in the general territory may be considerably less, so much so as to make the one shipper's experience an unfair basis for the rates generally.

Use to Which Commodities Are Put. In determining the reasonableness of rates the use to which a commodity is or may be put cannot lawfully be made the basis for a difference in the charges.^① This question, or doctrine, is most frequently encountered in cases under Section 6 of the Act involving the determination of what is the lawful or applicable rate on a given commodity.

Exceptions to Rule. There are apparent exceptions to this general rule. For example, phosphate rock is often included in the description of rates on fertilizer or fertilizer materials. Other rates apply on phosphate rock as such. The only reason for including phosphate in the fertilizer item is that it is *used* as an ingredient of fertilizer. In this sense, it will be seen that the use to which the phosphate rock is put does, in fact, enter into the reasons for the establishment of the rate. The measure of the rate is also affected by this fact.

Other apparent exceptions exist by reason of the difficulty of describing some articles.

The Commission has held that the use to which a commodity is put cannot determine the measure of a rate but may be a proper consideration in connection with the proper definition of the article in making up the tariff description.

For example, there are many kinds of pipe, one of which is galvanized pipe used for culverts under roadways. This

^① *Davis Case*, 16 I.C.C. 214, 216.

kind cannot be better described than as "culvert pipe." But the mere fact that a tariff carries an item on culvert pipe would not necessarily mean that a shipment of pipe of this size and kind would have to be used as a part of a road culvert in order that this rate would apply. On the other hand, the description "culvert pipe," undoubtedly clarifies the kind of pipe which the framer of the tariff had in mind, and the fact that culvert suggests the use to which the article is ordinarily put, does not make the tariff description unlawful.

However, the Commission has recognized differences in rates on "domestic" coal and "steam" coal, although these terms denote the use to which the different kinds of coal are put.^① Nevertheless, after a shipment has been made, a carrier has no right to dictate or inquire as to the use to which the commodity may be put.^②

The Commission has had considerable difficulty with the rates on scrap iron. Many of the tariffs describe scrap iron as that which is good for remelting purposes only. The decisions upon this question are not all in harmony, but the sound view would be in line with the principles above stated. The fact that a tariff so describes a rate on scrap iron would not authorize the carriers to wait until after the shipment had been completed to find out whether the scrap iron was or was not actually remelted.

Packing. In making comparisons of rates the witness should be prepared to state how the articles used in the comparisons are packed. One rate may apply on shipments in bulk alone, while another may apply on shipments in barrels, another in bags, another in crates, and still others on shipments in various different kinds of containers. Occasionally the method of packing may have a distinct bearing upon the weight per cubic foot and upon the average loading. On certain classes of furniture, for

^① *McGrew Case*, 8 I.C.C. 630.

^② *American Creosote Works Case*, 18 I.C.C. 212, 215.

example, the rates for articles set up may be different from those for that article if knocked down; or the rates may differ depending upon whether the articles are nested, or not nested. Certain kinds of empty berry baskets can be nested and others cannot. When rates are cited which differ according to the kind of container used or the method of packing and shipping, these facts must be shown in connection with the rate exhibits.

Kind of Equipment Required. In making "like" comparisons of rates, articles should be selected which move in the same class of equipment. There are several reasons for this. Hopper-bottom gondolas, used for carrying coal, are usually constructed of steel, have a very large marked carrying capacity, and cost more than some classes of equipment and less than others. The cost of construction and the ratio of repairs are relatively higher on refrigerator cars than on many other kinds of equipment. Moreover, their tare weight is relatively large in comparison with the inside cubic capacities. Tank cars, which are used for oils, sulphuric acid, molasses, water, and other liquids, are specially constructed and require special facilities for loading and unloading. There is a relatively heavy private ownership of refrigerator and tank cars and the carriers are obliged to pay mileage allowances for their use. The Commission has held that shipments which move in equipment furnished by the shipper are entitled to lower rates than would be reasonable for shipments in carriers' equipment.^① These facts are important in certain cases and not in others.

Some commodities, such as salt, require water-tight roofed box cars; others, such as grain, loaded in bulk, require special protection at the doorways; others require floor racks, or special bracing after being loaded into cars; while still others require special facilities, such as sand or bedding for livestock, and meat racks for carcass

^① *St. Louis Chamber of Commerce Case*, 74 I.C.C. 308, 321.

fresh meats. The witness who testifies concerning the rates should have actual knowledge of the conditions surrounding the transportation of the freight in different classes of equipment.

Kind of Service Required. Three ordinary classes of service designated as usual, expedited, and special service affect to a marked degree the measure of the rate. Usual service means the service that is ordinarily accorded general merchandise and other carload freight where no special or expedited services are required or necessary.

Articles Requiring Like and Unlike Service. Where different articles are compared to show analogy, the articles selected should require the same kind of service. For example, when a comparison is desired between rates on fresh meats on the one hand, and other articles, the other articles should be dairy products, vegetables, or other perishables which move in refrigerator cars and require refrigeration. In comparing rates on fresh meats with those on packing-house products, some consideration should be given the fact that there is a difference in perishability, the fresh meats requiring much greater refrigeration efficiency than the packing-house products.

If the comparison is made by contrast of unlike commodities, then the fact that different classes of service are accorded will heighten or strengthen the comparisons. Thus, if rates on lumber, which moves both in open and in ordinary box-car equipment, were in issue, and if the complainant could show that the revenue on lumber was higher than the revenue under the rate on packing-house products from and to the same points, the fact that the packing-house products move in refrigerator cars in expedited service, and that lumber does not require special equipment or expedited service, serves to enhance the value of the comparison.

The Commission has held that the special expenses incurred in transporting meats and products constitute an

important element to be considered in determining the reasonableness of the rates upon these commodities.^①

In the *Iron Ore Rate Cases*,^② the Commission pointed out the difficulty of determining the reasonableness of rates on ore without analyzing the special costs incident to the peculiar services performed at the docks and terminals in connection with the line-haul rates.

Susceptibility to Damage. The inherent susceptibility of a commodity to damage by heat, cold, or lack of ventilation during transit, is a factor to be considered in the determination of the reasonableness of the rates on that commodity. This susceptibility imposes upon the carrier an obligation to take special precautions against damage due to heat, cold, or lack of ventilation during transit. The element of risk, or hazard, in transporting such commodities varies materially with the commodity and should be taken into consideration in fixing the rates. In the *Perishable Freight Investigation*,^③ the Commission said that it had "no doubt that considerable risk attends Carriers' Protective Service, even with suitable equipment and reasonable transportation conditions, and this is properly to be considered in estimating the cost of the service." In the same case,^④ the Commission said that the carriers "are fairly entitled to a moderate margin over cost as an allowance for the factors of hazard and profit."

While there is a substantial hazard in the refrigeration service, the carriers should not attempt to include in the factors which go to make up a reasonable freight rate items of loss due to failure to furnish refrigerator equipment within a reasonable time, or failure to deliver at

^① *Rath Packing Co. Case*, 56 I.C.C. 303, 305. *The Morrell Case*, 104 I.C.C. 104, gives a good discussion of the services incident to the transportation of live-stock, meats, and packing-house products.

^② 41 I.C.C. 181, 204.

^③ 56 I.C.C. 449, 540.

^④ Page 522.

destination within a reasonable time. The shipper should not be made to pay for the carriers' negligence.^①

Carrier's Responsibility as Insurer. The element of risk, due to the inherent nature of the goods, such as the risk of damage to other freight in transporting dynamite, is one of the characteristics of the railroad's business as a common carrier. Being a common carrier the railroad is required to exercise more than ordinary caution in the prevention of damage to freight entrusted to its care. It is responsible for the safe delivery of the goods, and to this extent is an insurer of freight against all loss except such as may arise through one of the excepted causes as, for example, act of God.

Added Risk as Measured by Cost of Insurance. Additions to rates, commensurate with the carrier's risk as an insurer, should not exceed the cost of insurance. This theory is disputed and is debatable, depending upon the particular facts of each case, but the difficulty of debating the question arises from the fact that the greater the value of the goods, the greater the risk, and aside from the element of risk, the higher value warrants a higher rate because of the greater value of the service. Were it not for the intermingling of these factors in determining the reasonableness of rates, the principle would ordinarily hold good, namely, that the element of risk should increase the rate only in proportion to the cost of insurance.

Proof of Claim Frequency. The fact that a commodity is inherently free from susceptibility to heat, cold, or damage by breaking, has strong probative force in fixing freight rates. If there is practically no loss and damage, a mere statement to that effect is sufficient. Where damage claims are frequent, or more or less regular, in connection with the transportation of a specific commodity, such as hogs, for example, the record in the case should contain fairly representative statistics showing the total

^① *New Orleans Livestock Exchange Case*, 10 I.C.C. 327, 331.

freight claims on that commodity and the total freight revenue, over the line of the defendant, or lines of all carriers within a given territory.

If possible, separation should be made between the claims due to "stray" or lost shipments and those resulting from damage in the usual course of transportation. If the shippers are unable to obtain such figures from the membership of the various associations of which they may be members, they may call upon the carriers prior to the hearing, to produce such statistics from their records. Occasionally, resort to *subpoenas duces tecum*^① may be necessary. In many cases the carriers furnish such data as they may have in their records.

Direction of Movement. Occasionally the carriers, to offset a showing in connection with the volume of a particular kind of traffic, offer a defense that the tonnage is in the same direction as the great preponderance of traffic. The theory underlying this defense is that where the preponderance of traffic is in one direction, there is a heavy movement of empty cars in the opposite direction, thus resulting in "unbalanced traffic." On the other hand, shippers can use the same argument in their own favor when the traffic in question moves in a general direction opposite to the preponderance of the loaded haul. The theory of this argument is that the tonnage furnishes revenue loads for cars which would otherwise return empty.

Rates on Opposite Movements. In numerous cases the Commission has held that the rates on a particular commodity in one direction are not necessarily a fair measure of the rates on the same commodity in the opposite direction. This reflects the general practice of establishing commodity rates in one direction only on account of a heavy movement in that direction. Ordinarily, where a commodity, such as salt, is produced in great quantities,

^① A *subpoena duces tecum* is a writ requiring a party who is summoned to appear in court to bring with him some document, piece of evidence, or other thing to be used or inspected by the court.

as it is in the mines in New York State, the commodity rates outbound from such mining points and areas represent a great amount of tonnage, and there is practically no movement in the opposite direction to those mine points. However, there are exceptions to this one-way rate basis as is illustrated by class rates, for example, which ordinarily are made the same in both directions.

Not all members of the Commission agree upon this point. Some hold that the rates on a commodity in one direction, such as rubber heels for shoes from the East to the Pacific Coast, should be applied also in the opposite direction, even if there is no substantial movement. They take the stand that the rates ought to be made the same in both directions in order not to hinder or discourage the building of manufacturing plants on the Pacific Coast which could ship rubber heels eastbound.

There are some peculiar exceptions to the general rule that the movement from producing points of raw materials is almost entirely in one direction. Salt moves from Michigan into the immediate vicinity of the Kansas salt fields, and salt from Kansas moves to Chicago. This illustration serves to show the necessity of familiarity with the actual movements of particular kinds of traffic, and the directions of the preponderance of the tonnage.

Empty Return Movement. Carload and less-than-carload freight rates are supposed to cover the placement of the empty car for loading, and the removal, from the unloading tracks, of the empty car at destination. In theory no provision is made directly for a long-haul movement of an empty car to a loading track or for a long-haul movement of the empty car from the unloading track.

The rates on ordinary freight in ordinary equipment are made on the assumption that generally there will be some further use for a car after it has been unloaded at destination, without any great length of haul to the next loading point.

The rates on a number of heavy-moving commodities, such as coal, are made in contemplation of the necessity for hauling the empty cars long distances. In many instances the movement of coal represents practically what is termed a "turn around." That is, the cars are loaded at the mines, transported to destinations, and returned empty from those destinations to the same, or approximately the same, coal-mining district.

Under the American theory of rate making, the carriers cannot charge for the empty movement of equipment, either in the placing of cars for loading, or in the disposition of the cars after unloading. This theory obtains whether the empty movement is a switching movement or a road-haul movement.

Ratio of Empty Return Movement. It is therefore necessary to know, in general terms, the ratio of the empty return movement to the loaded movement, in determining the reasonableness of the rates on any particular commodity. That is to say, if there is a movement of say 100 cars of coal per annum from the Birmingham, Ala., district to Meridian, Miss., and the average number of cars returned empty from Meridian to the Birmingham district for re-loading with coal is 90, then the ratio of the empty return movement of coal cars between these points is 90, or 90 per cent of the loaded movement.

The ratio of empty to loaded movement of coal cars is ordinarily high. Livestock cars from the West to the New York market, for example, require a very high ratio. The ratio of empty to loaded movement of refrigerator cars for meats, packing-house products and vegetables, is often high, but there are more general uses for this class of equipment than there are for coal or cattle cars. The ratio of empty to loaded movement, is ordinarily very high for tank cars and very low for box cars. However, in the case of particular kinds of traffic in certain territories, even the ratio of empty box cars may be very high

due to commercial conditions which keep the traffic "unbalanced."

In making comparisons of rates the witness who offers the exhibit should know the ratio of empty to loaded movements under the rates employed for comparative purposes. In many cases the exact statistics of empty ratios are available only to the carriers, but frequently they will give the information which they have at hand to interested shippers. If they are unwilling to do so the shippers may resort to the Commission and compel the production of the information if it is necessary, and if such evidence becomes of vital importance in a formal case assailing the reasonableness of the rates.

Regularity of Movement. Regularity of movement is one of the many elements to be considered in determining the reasonableness of rates, and in the comparison of rates. Regularity is not synonymous with volume. Some classes of traffic move in great volume during certain portions of the year, as, for example, the potato movement from Maine. Other classes move in fluctuating waves. But there are still others which move from day to day, month to month, year to year, unaffected by seasonal conditions and not materially affected by market conditions and this is the class which is designated as regular.

The movement of livestock from Chicago and other markets to New York City, for example, is enormous in volume and is steady throughout the year. The movement of salt is also of enormous volume and is steady throughout the year. The movement of perishables, such as fresh fruits and vegetables, is enormous, but, due to climatic conditions, the source of supply shifts rapidly from one section of the country to another, depending upon the season of the year.

Certain classes of traffic that move on class rates present a different picture of regularity. Canned tomatoes,

for example, move generally throughout all parts of the country and in practically all directions of the compass, and the movement, although not heavy between many particular points, is regular, but widely diversified as to points of origin and destination.

Knowledge of the commercial and seasonal conditions which affect the regularity of movements of traffic is essential in dealing with the reasonableness of rates as well as in making comparisons between commodities.

Paper Rates. One of the most frequent mistakes in selecting comparisons of rates is the use of what is known as "paper" rates—rates under which there is no movement. Upon cross-examination witnesses are often forced to admit that they do not know of any movement under the rates used for comparative purposes, and thereupon the value of the comparison is totally destroyed. The mere fact that a rate is published in a tariff carries with it no presumption that there is any regular or substantial movement under that rate. The fact that there is a movement must be proved by competent evidence and cannot be left merely to an implication that the rate would not have been published if there had not been a prospect of movement.

One illustration of the general doctrine with respect to such rates, as laid down by the Commission, suffices. In the *Devine & Asselstine Case*,^① the Commission observed that when a basis of group rates from the Atlantic coast to the West was established, no special thought was given to the reasonableness of the rates on oranges from Florida to Montana points, and since no oranges move from Florida to Montana, such a group rate is in effect a paper rate and cannot be accepted as a reasonable basis on grapefruit and oranges from Florida.

Care should be taken to avoid confusing paper rates with rates on sporadic shipments.

PRACTICAL APPLICATION

Problem. Crushed greenstone is used in the manufacture of prepared roofing paper. It is of greater value than ordinary crushed stone, and is used for ordinary purposes, such as ballast and road making, only when the roofing manufacturers are oversupplied. Crushed stone usually moves under commodity rates considerably lower than sixth class. On ten shipments of crushed greenstone from Baltimore, Md., to Lockport, N. Y., the applicable sixth-class rate was charged. In defense of this charge the carrier contended that crushed greenstone is more valuable than crushed stone because it is used in the manufacture of roofing paper, for which ordinary crushed stone is not adapted.

Do you consider this sufficient to prove the sixth-class rate reasonable and proper?

Solution. The carrier's contention is not sufficient to prove the reasonableness and the applicability of the sixth-class rate in view of the repeated refusal of the Commission to sanction different rates on the same commodity (crushed stone) based upon the use to which it is put. The facts in this case were taken from the *Lockport Paper Case*, 87 I.C.C. 349.

Chapter VI

REPARATION UNDER SECTION 1

THE foregoing discussion in this and the preceding manual, with respect to grounds of proof in cases arising under Section 1 of the Act leads now to a consideration of reparation or recovery for damage sustained by reason of violations of that Section. If it is assumed that a rate has been or can be proved unreasonable, the question next arises: When or under what circumstances may reparation be awarded? Before this question is considered, however, certain preliminary matters concerning the determination of reasonableness, must be disposed of.

Rate Judged by Contemporaneous Facts and Circumstances. In determining the reasonableness of rates the Commission should and does regard the problems presented by the issues and evidence from the standpoint of the contemporaneous facts and circumstances surrounding each particular rate or set of rates. The reasonableness of rates cannot be determined by any mathematical calculation, regardless of the completeness and fairness of the various mathematical tests of revenues, expenses, or costs, although such tests must play a not inconsiderable part in completing the mental picture which is the foundation of the Commission's conclusion.^①

Having determined, upon the evidence submitted in one case, what constitutes a reasonable rate from and to certain points, the Commission's conclusion cannot be regarded as determinative of a like question with respect to the rates from and to other points. Seldom can different

^① A general discussion of this subject may be found in *Re Advances in Rates*, 20 I.C.C. 307, 315.

sets of rates, between different points of origin and destination respectively, be measured alike.

Past, Present, and Future Not Necessarily Related. For these and similar reasons the conditions and circumstances surrounding a certain rate seldom remain so unalterable as to establish a *prima facie* presumption that the rate should remain fixed for all time. The general level of the rate structure of the country as a whole was changed in 1918, 1920, and 1922. Thus, within a period of only slightly more than four years there were three complete changes. Various other general changes in rate structures in smaller portions of the nation have, likewise, been made from time to time. Often the conditions under which rates were made change rapidly, due to commercial conditions and other factors which influence the volume of the movement, the costs of operation, and the prices of labor, fuel, materials, and supplies.

However, when a rate has been prescribed by the Commission, there is a presumption, until the contrary has been shown, that the rate should be continued in effect. The Interstate Commerce Act formerly limited the time, within which the Commission's order could run, to two years. This was apparently upon the theory that conditions would probably change so as to require or warrant changes after more than two years. Subsequently, however, the Act was amended so that the Commission's orders could remain in effect indefinitely or until changed by further order of the Commission.

Where carriers maintain a rate voluntarily over a period of time, this fact raises a presumption with respect to the reasonableness of the rate, provided there is a movement, but such a continuation of a rate is not conclusive evidence of reasonableness.^①

Reduction in Rates. The subsequent reduction of a rate by voluntary act of the carrier does not of itself, unsup-

^① *Holmes & Co. Case*, 8 I.C.C. 561; *National Hay Assn. Case*, 9 I.C.C. 264.

ported by other evidence, justify a finding that the rate formerly in effect was unjust and unreasonable. This doctrine has been uniformly stated and followed by the Commission in many cases.^①

Even where the rate charged on a particular shipment is subsequently reduced by order of the Commission this is not conclusive proof of the unreasonableness of the rate charged. The defendant may show that the new rate was a part of an extensive readjustment, involving both increases and decreases.^②

In the *Foster Lumber Co. Case*,^③ which may be considered a leading case upon this point, the Commission held in effect that it would be unwise as a matter of policy for the Commission, upon a voluntary reduction of a rate by a carrier, to award reparation to every shipper who had paid the higher rate, where there had been no application to the Commission for such a reduction and where it does not clearly appear that the rate was, at the time, unreasonable.

Difference in Rates Not Conclusive. The principle, that a mere difference in rates is not conclusive evidence of unreasonableness, has found repeated expression in the Commission's decisions and has been upheld by the Supreme Court of the United States. For example, the mere fact that the rate to a certain port applicable on domestic traffic exceeds the one on export traffic, is not conclusive evidence of unreasonableness. The Commission is bound to take into consideration the facts and circumstances under which both kinds of rates were made.^④ In making comparisons of rates the complainant should not offer comparisons of export rates as fair measures of domestic rates.

^① *Wofford Oil Co. Case*, 66 I.C.C. 509; *Miami Copper Co. Case*, 93 I.C.C. 221, 222; *Universal Oil Co. Case*, 93 I.C.C. 237, 240.

^② *News Corp. Case*, 93 I.C.C. 383.

^③ 15 I.C.C. 56.

^④ *Texas & Pacific Railway Co. v. I.C.C.* 162 U. S. 197; 219 U. S. 423, and 240 U. S. 334.

Reparation Under Section 1. Reparation, in a rate case alleging unreasonableness of rates in the past, means the amount of money, which the shipper is claiming, based upon the difference between the charges which have been paid for the transportation of actual shipments, and the charges which would have accrued had the rate, which the complainant is seeking, been in effect at the time that the shipment moved. Reparation is therefore the equivalent of a claim for damages based upon differences in freight rates, fares, or charges.

In the case of *Mills v. Lehigh Valley R. R.*^① the Supreme Court of the United States said that no distinction could fairly be made between a finding by the Commission under Section 1, that a shipper "was damaged" and that he was entitled to "the stated amount as reparation." The Court said that, "when the Commission made the award 'as reparation' they undoubtedly expressed the decision as a matter of ultimate fact, that there was an injury to this extent to be repaired. No other intelligent construction can be put upon their statement."

The use of the word reparation, then, has, by usage and ultimate construction, acquired special significance in that it has reference in rate cases to claims and awards of damages by the Interstate Commerce Commission, as distinguished from claims for damages in the courts.

Reparation as a Matter of Law. Section 8 of the Interstate Commerce Act provides that carriers shall be liable for damages to the shipper. Section 9 provides that a shipper may complain to the Commission for any violation of the Act or may sue in the Federal courts, or in state courts of general jurisdiction. Section 16, paragraph 1, provides that after hearing upon a complaint made under Section 13 of the Act, the Commission, if it shall find that any complainant is entitled to an award of damages

under the provisions of the Act for a violation thereof, shall make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named.

Section 16 further provides that if the carrier does not comply with the order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. In such a suit the Act makes the findings and order of the Commission *prima facie* evidence of the facts stated therein.

This section further limits to two years the right of action in claims for damages before the Commission. Suits in the district courts for the enforcement of orders of the Commission must be brought within one year after the date of the order. .

Right of Trial by Jury. The power of the Commission to award reparation under the original Act to Regulate Commerce was seriously questioned by the Commission itself, and the Act was amended on March 2, 1889, so as to remove the objection that it denied defendants their constitutional right to trial by jury.

The nature of the action before the Commission is *ex delictu* and not *ex contractu*. For those unfamiliar with the technical meaning of these legal terms it may be said that *ex delictu* causes of action are causes which arise from or grow out of wrongs or torts, as contrasted with *ex contractu* causes of action which grow out of contracts. The amendment of 1889, provided, in cases involving the right of trial by jury, that the Commission's order would be *prima facie* evidence in a suit, for trial and judgment as at common law, based upon the Commission's order. Therefore, the fact that the Commission, in its quasi-

judicial capacity, fixes an award of reparation as damages due to the payment of unreasonable freight charges in the past, does not mean that it thereby denies the defendants the right of trial by jury.^①

In the case of *Texas & Pacific Railway v. Abilene Cotton Oil Co.*,^② the Supreme Court, in holding that a claim for reparation, or rate damages, under an allegation of unreasonableness, must first be brought to the Commission, said: "A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule."

Measure of Recovery. The Commission has uniformly applied the rule that—

The measure of damages is the difference between the rates charged and the rates found reasonable.

This theory of damages is based upon the common-law principle of extortion, and has been upheld by the Federal courts. In the *Burgess Case*,^③ which was quoted and affirmed by the Supreme Court of the United States, the Commission said that "in our judgment, a rule requiring the shipper to mathematically demonstrate that it was actually pecuniarily damaged to the amount of the unreasonable excess in rates so paid would effectually emasculate the reparation provision of the Interstate Commerce Act."

However, the fact that the measure of rate damages is the difference in rates does not necessarily mean that reparation must follow as a matter of law where a rate has been reduced after shipments have moved. The Commission may make a finding for the future, which does

^① *William H. Macloon Case*, 5 I.C.C. 84.

^② 204 U. S. 426.

^③ 13 I.C.C. 650.

not necessarily carry with it, by implication, a finding that the rate was unreasonable at all or to the same extent in the past. The Commission must make the finding as of the past and must find that the parties who made the shipments, actually paid, or bore the freight charges as such, or are the real parties in interest and lawfully entitled to an award under the issues as drawn in the complaint.^①

PROOF OF PECUNIARY LOSS NOT NECESSARY. In *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, No. 25, decided in October term of 1925, the Supreme Court of the United States overruled a contention of the defendants that in a case involving the unreasonableness of rates there must be specific proof of pecuniary loss. The Court said that "a recovery for excessive freight charges can be had under Section 1 without specific proof of pecuniary loss," and that "the measure of damages is the amount of the excess exacted."^②

General Damages Under Section 1. Occasionally claims for general damages, such as loss of business or loss of profits, have been made in addition to damages represented by the differences in rates. Ordinarily a claim for general damages, as distinguished from rate damages, will lie only in the courts. However, when the case is brought by complaint before the Interstate Commerce Commission, involving the reasonableness of rates and asking rate damages, the Commission has the power to award all damages arising out of the charging of the unreasonable rates. In such cases the shipper cannot present his claim for rate-damages, or reparation, to the Commission, and bring a separate suit at law for general damages incurred in addition to or apart from the rate damages.^③ This rule of law is based upon the legal principle of avoiding multiplicity of suits and actions.

^① *Partin & Orendorf Co. Case*, 42 I.C.C. 29; *Anadarko Cotton Oil Co. Case*, 20 I.C.C. 43, 49.

^② See also *Southern Pacific v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 534.

^③ *Louisville & Nashville v. Ohio Valley Tie Co.* 242, U. S. 288.

Statute of Limitations. All complaints for the recovery of damages must be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case the two-year period is extended to and includes ninety days from the time such action by the carrier is begun.

One leading principle in connection with the limitation provisions of the Act must be mentioned. In *Phillips v. Grand Trunk Ry.*,^① the Supreme Court held that:

The limitation provisions of the Interstate Commerce Act not only bars the remedy but extinguishes the liability.

When Does the Cause of Action Accrue? In the *Blinn Lumber Co. Case*,^② the Commission held that the cause of action accrues upon the date of the delivery of the shipment. In the *Louisville Cement Case*, decided in 1918,^③ the Supreme Court of the United States reversed the Commission, and held that the cause of action accrues on the date of the payment of the charges. On February 29, 1920, the Act was amended to provide as follows: "In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."^④

In view of the fact that no claims can now be filed for shipments made during the period of Federal control, no discussion of the special provisions with respect to the limitations of actions against the Director General is deemed necessary. The requirements of the Commission

① 236 U.S. 662, 667.

② 18 I.C.C. 430.

③ 246 U.S. 638.

④ Section 16, paragraph 3.

with respect to the filing of claims informally, and the filing of formal complaints after informal complaints have been denied, is discussed in connection with a later manual dealing with the Commission's Rules of Practice.^①

Who May Obtain Reparation. The question of the rights of parties to awards of reparation is always a question of law and often is also a disputed question of fact. During the period of Federal control the attorneys representing the Director General placed every possible legal obstruction in the path of reparation claims against the Director General and, as a result, almost every angle of this question was passed upon by the Commission. Many of these cases went to the courts. The net result of the Director General's onslaught upon the Commission's reparation practice and decisions, served only to strengthen the Commission upon stands which it has almost uniformly taken since its inception.

Protest Unnecessary. It is not essential that the party to the transportation record, who paid the freight, should have protested the payment of the charges as being unreasonable, either before or at the time of the payment. Moreover, the fact that the party may have brought a suit in the United States circuit court for the recovery of excessive railway charges, prior to the time that the Commission passes upon the reasonableness of the rates, does not bar a subsequent proceeding before the Commission where that suit was dismissed without prejudice.^②

Claimant Should Be Party to Transportation Record. If the person who paid the freight charges to the carrier is a party to the transportation record, he is, ordinarily, the proper party to ask for reparation and is the one to whom reparation will be awarded.

^① GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION: HANDLING THE CASE.

^② *Baer Bros. Mercantile Co. Case*, 13 I.C.R. 329, 339; and *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.* 204 U.S. 426.

The first essential principle concerning the right of a party to obtain reparation, in cases involving the reasonableness of rates, is that he should be the party who has paid the freight charges to the carrier.

The consignor who pays the freight charges at point of origin, is entitled to recover reparation notwithstanding the fact that he subsequently collects from the consignees the freight charges which he has paid. This advanced doctrine was settled by the full Commission after mature consideration of a number of like cases in the *Missouri Portland Cement Co. Case*.^①

PRIOR TO MISSOURI PORTLAND CEMENT CO. CASE. Prior to the *Missouri Portland Cement Co. Case* decision, the Commission had almost uniformly held that where the consignor had charged the freight, as freight, to the consignee, that is, where the goods were sold f. o. b. point of origin and the consignor had paid the freight for the consignee and had charged, as a separate item, the freight charges against the consignee, the consignee was the party entitled to reparation. The *Missouri Portland Cement Co. Case* is important in that it marks a breaking away from previous decisions in this respect.

DECISION IN MISSOURI PORTLAND CEMENT CO. CASE. The *Missouri Portland Cement Co. Case* was the natural resultant of the Supreme Court's decision in *Southern Pacific Co. v. Darnell-Taenzer Co.*,^② which, in turn, was based upon an old Commission case.^③ In that case the consignees paid the freight charges on delivery of the shipment and deducted those charges in making settlement with the shipper for the consignment of lumber. The complainants, who were the consignors in the *Burgess Case*, thus actually "bore" the charges, according to

① 88 I.C.C. 492.

② 245 U.S. 531.

③ *The Burgess Case*, 18 I.C.C. 680.

the Commission's terminology, and reparation was awarded to them. The defendants contended that the consignors had passed these charges on to the consumers in the price of the lumber.

In reviewing the *Darnell-Taenzer Case* the Supreme Court said:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step."

This is the principle underlying the Commission's decision in the *Missouri Portland Cement Co. Case*. The party to the transportation record, who paid the charges to the carrier, was alone in privity with the carrier and was the proper party to recover a portion of those charges based upon unreasonable rates.

Rights of Parties to Recover. One feature of the *Missouri Portland Cement Co. Case*, which has been misunderstood, merits special attention. In that case the consignor, who paid the charges, asked for and received reparation. This doctrine applies to this situation alone and does not deprive any interested party of the right to ask for reparation. Where the consignee brings the complaint, and he has asked the consignor to pay the charges for him, and the consignee remits the freight charges to the consignor, the consignee who "bore" the charges, has the right to recover reparation in his own name. The principle in the *Missouri Portland Cement Co. Case* does not deny the right of the consignee, under such circumstances, to recover.

Commission Determines Real Party. One other distinction between the *Missouri Portland Cement Co. Case* and others should be carefully noted. The cases above mentioned deal only with the primary rights of certain classes of complainants to recover reparation. Where there is a dispute between the parties to the transportation record, namely the consignors and the consignees, as to which one

is entitled to an award, the Commission must determine, upon all of the facts, which is the real party in interest.

In the reparation cases leading to the Supreme Court decision in the *Sloss-Sheffield Steel & Iron Co. Case*, the Commission decided, as between the consignors and consignees, that the consignors' claim under their contract was valid and that the consignors were the parties entitled to reparation. Later the consignees, in future and further proceedings in the same cause, acquiesced in the Commission's award to the consignors. In *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*^① the Supreme Court took this fact into consideration and affirmed the Commission's award.

The fact that the Supreme Court sustained the Commission's awards in the *Burgess Case*, the *Darnell-Taenzer Case* and the *Sloss-Sheffield Case*, indicates clearly that the Court will not upset the Commission's awards where they are based upon substantial facts, unless there is some vital, arbitrary, or legally erroneous theory involved in the Commission's action. The Supreme Court's decision in the *Sloss-Sheffield Steel & Iron Co. Case* is a landmark in the annals of reparation and deserves careful study by the student of interstate commerce law. Many points were considered in that decision which are out of place under this particular subject heading, such as the finding that interest is allowable as a part of the damages in a reparation case.

Rights of Persons Not Parties to Transportation Record. Where the party claiming reparation is a stranger to the transportation record different principles of law and questions of fact are involved. In some instances such strangers are the real parties in interest to whom the reparation should be paid; in other instances they are not. While it is impossible to discuss here all of the many angles of these questions which have arisen and been

decided, it is desirable, nevertheless, to mention a few of the important cases and the principles involved.

In the *Henderson Case*,^① the Commission held that the complainants, although they were not named in the bills of lading or freight bills as parties to the transportation records, were, in fact, represented by the consignor as their agent, that these complainants were the real parties in interest, that the agent had the right to bring the complaint in their behalf, and that they ultimately bore the freight charges. This is an exception to the usual rule that a stranger to the transportation record cannot recover.

In the *Oden & Elliott Case*,^② the Commission held that the complaint, which was brought by Oden & Elliott to recover for their own account, and not as agents for their vendors, was barred because the complainant had not joined these real parties in interest in the complaint until after the statute had run against the real parties in interest. The theory of this portion of the case is founded upon the principle that strangers to the transportation record, in order to recover, must file their complaint within the statutory period and must show the connection between their interest and the parties who acted for them in the payment of the freight charges. Where strangers to the case and to the record seek reparation, the final test as to who shall recover "is the bearing of the freight charges for the transportation service; and this may be either the consignor or the consignee, or another party, even though not disclosed at the time the shipment is made."

Rights of Factors or Commission Men. In the *Memphis Freight Bureau Case*,^③ the Commission held that the cotton commission men at Memphis, Tenn., who, acting for the growers, handle the inbound shipments into the

^① 39 I.C.C. 483.

^② 57 I.C.C. 698.

^③ 50 I.C.C. 345, and 57 I.C.C. 312.

compress at Memphis, pay all inspection and freight charges and sell the goods, have the right to collect reparation as factors in their representative capacity. The Commission pointed out in that decision that the factor, or commission man, has an interest in the goods, and that the reparation could not be justly and legally awarded directly to the growers (principals), when the factors, or commission men, have a lien against the proceeds from the goods for their services and expenses incident to their profession. This decision has been followed in later cases.

Rights of an Association. In a number of cases the defendant carriers have questioned the right of an association to bring a complaint for reparation. In the *Tanners' Council Case*,^① the Commission found that a complaint, which did not name the members of the association, or council, and at the hearing of which an attempt was made to bring in the real parties in interest by the filing of powers of attorney authorizing the complainant to collect reparation, was not amended by the powers of attorney, and that the consignors, thus having failed to file their claims properly within the statutory period, were not protected. Their claims were denied.

In numerous other cases the right of an association to bring a complaint, asking reparation on behalf of its members has been upheld and affirmed. In such instances, however, it is essential that the members of the association on whose behalf reparation is claimed, be named as such in the complaint, or made parties to the case by amendment within the statutory period, or as co-complainants.

The complaint in the *Carney Case*,^② was brought by a public traffic manager in his own behalf. The Commission held that he was not the party in interest, so far as

^① 66 I.C.C. 415, 419.
^② 66 I.C.C. 560.

reparation was concerned, and that no award of reparation could be made.

In *Spiller v. A. T. & S. F. Ry. Co.*,^① the Supreme Court of the United States held that an assignee of the legal title to reparation claims, may claim an award of reparation by the Commission and recover the amounts awarded by an action at law, brought in his own name, but for the benefit of the equitable holders of the claims, especially where such is the real purpose of the assignments.

CONCLUSION

In closing this section of the subject of reparation a few words should be added with respect to the Commission's attitude towards the reparation features of the Interstate Commerce Act. Upon the whole the Commission, itself, is distinctly opposed to the policy of having the reparation power vested in the Commission. More than once, in its annual reports to Congress, the Commission has recommended and sought vainly to have the Act amended so as to withdraw this phase of its activities. The Commission is opposed to the "policy which permits a private individual who has not really suffered damages to recover."^② The Commission has asked Congress to vest the power to award rate damages in the courts alone. Congress has tacitly ignored all of these recommendations and has continued the rate damages and reparation provisions.

Under the circumstances it would, of course, be extremely unfortunate if the Commission should attempt to force its ideas upon the reparation question by throwing so many technical difficulties and obstructions in the paths of the shipper as to prevent him from filing reparation claims. As long as these provisions are continued in the Interstate Commerce Act the Commission should live up to them, and is doing so.

^① 253 U.S. 117.

^② *Annual Report*, 1919, page 17, and *Annual Report*, 1916.

PRACTICAL APPLICATION

Problem. The South Carolina Cotton Manufacturers' Association, in a complaint filed for its members duly named therein, received a favorable decision from the Commission on May 18, 1920, wherein the Commission found unreasonable the rates charged on specified shipments of coal between October 15, 1911, and December 31, 1915, and awarded reparation to such members. Prior to this decision, it developed, that the name of the Excelsior Knitting Mills, a member of the Association, was not shown in the complaint. A petition of intervention was, therefore, filed by the Excelsior Knitting Mills on April 30, 1917. Was this action proper and would such intervener be entitled to reparation under the original complaint of the Association?

Solution. The intervention was the correct procedure but it should have been filed before the time limit had expired. In this case reparation would not be allowed as the Excelsior Knitting Mills' claim would be barred under the statute of limitations.

This mill would have been entitled to reparation under the original complaint had its name, as a member, been included by the Association in the complaint.

TRAFFIC MANAGEMENT

MANUAL 67

GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION

UNDER SECTIONS 2, 3, 4, 6, 13, and 15 OF THE ACT

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THE PURPOSE OF THIS MANUAL AND TRAINING SUGGESTIONS

PROOF in rate cases brought under Section 1 of the Act is treated at considerable length in the two preceding manuals, both in respect to the various "measures" employed as tests of unreasonableness which the Commission has recognized as valid, and with reference to the securing of reparation. It remains, therefore, to develop the effective presentation of evidence in cases arising under Section 2 and /or Section 3, and likewise in proving violation of Sections 4, 6, 13, and 15.

As explained in connection with Section 1 cases, the Commission relies upon rate comparisons to a very great extent in making its decisions in rate cases. This is not to be wondered at, for nearly every rate case involves not only the measure or level of rates in themselves, but also their relationship to other rates, or discrimination. Just as the reasonableness of a rate may be challenged under Section 1 of the Act, so under Section 2 the charge may be brought that the rate is unduly discriminatory, or under Section 3 that it is unjustly prejudicial, to one locality, person, or description of traffic and unduly favorable to another locality, shipper, or description of traffic. It is self-evident that, in such cases, rate comparisons may be relied upon as a fundamental and essential part of the evidence used to prove or disprove a complainant's or a defendant's case.

Typical rate cases which may arise under other sections of the Act include:

Section 4—When violation of the long-and-short-haul clause is alleged.

Section 6—When the "legality" of the rates is in issue.

Section 13—When the complaint hinges on the relationship between interstate and intra-state rates.

Section 15—When the "routing" of a shipment is in issue.

The authors' suggestions as to the kinds of evidence and methods of proof in cases involving these sections of the Act are drawn from actual cases and from their large and varied experience in this particular field of work. These manuals on GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION are offered, therefore, with confidence that they may be relied upon as being material to the issues presented in the trial of rate cases before the Interstate Commerce Commission, quite generally recognized as the most exacting and most highly specialized type of traffic work.

TRAFFIC RESEARCH STAFF

The diversified traffic experience of the members of the Traffic Research Staff embraces work in the governmental, railway, steamship, highway, industrial, and educational fields. Each member is especially qualified by training and experience to co-operate in the work of investigating, planning, organizing, and presenting the training material and to co-ordinate the contributions of the various authors into a well-organized and effective course.

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Chapter I

PROOF OF VIOLATION OF SECTION 2

MANY of the complaints filed with the Interstate Commerce Commission allege discrimination or undue prejudice in rates, or other violations of Sections 2, 3, 4, 6, 13, and 15 of the Interstate Commerce Act. The problem of proving such violations involves the preparation and presentation of evidence which differs materially from that in connection with Section 1 cases. The grounds of proof under each of the six sections referred to are treated in this manual. In this chapter attention is directed to proof of violations of Section 2.

Purpose of Section 2. The purpose of Section 2 is to enforce equality of treatment to all shipments of the same kind of traffic, between the same points, which require the same kind of service, rendered contemporaneously and under substantially similar circumstances and conditions. Originally this section was designed to prevent rebates, as distinguished from Section 3 which was designed to prevent inequalities in published rates between competing localities, persons, and commodities.

Prior to the enactment of the Elkins law in 1903, the Commission had met with difficulties in attempting criminal prosecutions in "rebate" cases under Section 2. The Elkins Act remedied the deficiencies of Section 2 and, so far as criminal violations for rebates are concerned, has virtually displaced this section.^①

In the *Board of Trade of the City of Chicago Case*,^② the Commission commented upon the fact that Section 2

^① *Interstate Commerce Commission's Annual Report, 1903; Chicago & Alton Ry. Co. v. United States*, 156 Fed. 558; and *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 219.

^② 27 I. C. C. 530.

is founded upon the equality clause of the English Railway Clauses Consolidation Act of 1845, which, in turn, has been held and construed as embracing circumstances concerning the carriage of goods. In other words, "the clause did not allow carriers by railroads to make a difference in rates because of differences in circumstances arising before the service of the carrier began or after it was terminated."^①.

Kinds of Discrimination The purpose of Section 2 was to prevent various kinds of discriminations, but its latitude is so strictly confined that its employment in actual cases before the Interstate Commerce Commission on formal complaint has become rare. The kinds of discriminations aimed at in this section are direct or indirect special rates, rebates, drawbacks, or other devices. However, it is limited in numerous ways. In the first place it is limited by confining the discriminations to those between persons only, and not including discriminations between localities or commodities. It is also limited expressly to:

1. A like kind of traffic or message.
2. Like kind of service.
3. Contemporaneous services.
4. Transportation performed under substantially similar circumstances and conditions.

By construction Section 2 has been further confined to discriminations between shippers located in the same community.^②

A clear understanding of the four express limitations, named above, can be grasped only in the light of the judicial and administrative interpretations placed upon the words of the statute by the Federal courts and the Commission. The leading cases are outlined below.

Like Kind of Traffic. In the *Traffic Association of St. Louis Coffee Importers Case*,^③ the Commission said that

^① *Int. Com. Comm. v. Del. I. & W. R. R.*, 220 U. S. 235.

^② *Richmond Chamber of Commerce Case*, 44 I. C. C. 455, 464.

^③ 28 I. C. C. 484, 487.

sugar and coffee are not like kinds of traffic within the meaning of Section 2, and that it was the opinion of the Commission that the maintenance of different rates on coffee and sugar is not a violation of Section 2.

In the *Douglas & Co. Case*,^① the Commission said:

The question presented to us, therefore, is whether corn milled into starch is such like traffic with corn milled into other uncooked products thereof as to bring this rate relationship within the terms of that section.

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It may be that two commodities not identical may be of such substantially like character as to fall within the terms of Section 2 but such is not the case here.

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.... The only element to be considered under Section 2, however, is that of carriage, and it appears conclusively that starch is a much more expensive product and that its market price is much greater than that of the corn flour which it is said to resemble.

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Upon a full consideration of this matter, we are of the opinion that starch does not constitute such like kind of traffic with corn meal, hominy, grits, brewer's grits, corn flour, and other uncooked products of corn as is contemplated under Section 2 of the Act.

Like Kind of Service. The Supreme Court of the United States has held that service rendered in moving import and domestic traffic is unlike service within the meaning of Section 2.^②

Contemporaneous Service. There is a lack of direct and definite expression as to the proper interpretation of "contemporaneous service" under Section 2. The Commission has held, in general terms, that this does not mean necessarily that one carload of a given kind of traffic must move on the same day and in the same train to the party who receives the special rate or rebates, as another car of the same kind of traffic to the party who claims to be discriminated against. However, there must be an actual transaction on the part of the carrier, in connec-

^① 31 I. C. C. 587, 598, 594.

^② *Import Rate Case*, 162 U. S. 197; also *Pittsburgh Plate Glass Co. Case*, 13 I. C. C. 87, 88.

tion with shipments to the one party and to the party claiming discrimination, not necessarily upon the same day, but within a period of time which would connect the commercial transaction in some way, and during which the tariffs naming the rates in issue, were contemporaneously in effect. This interpretation of the Commission's expressions is our own, and cannot be found in any quoted passages in the Commission's decisions. However, the Commission has specifically referred, in a Section 2 case, to the word contemporaneous as referring to the concurrent period of the tariffs, but even in that case no definite line was drawn as to the reasonable length of such a contemporaneous tariff situation.

Similarity of Circumstances and Conditions. In the *Party Rate Case*,^① the Supreme Court of the United States held, in reversing the Interstate Commerce Commission, that charging a lower fare per person on party rate tickets for the transportation of ten or more persons than for a single fare, constituted dissimilar circumstances and conditions, and hence, could not be a violation of Section 2 of the Act.

In the *Wight Case*,^② the Supreme Court of the United States held that a cartage allowance made by one railroad without tariff authority, because the shipper to whom it was made would not have to pay any cartage if he shipped by another railroad, could not be excused on the ground that payment of the allowance was caused by competition between the carriers. In this case, competition between the carriers did not make the circumstances and conditions dissimilar.

In explaining the *Wight Case* in the *Mitchell Coal Co. Case*,^③ the Supreme Court said that not having undertaken to furnish free cartage it was unlawful for the carrier to perform that service for one patron and not for all others. Paying the favored consignee for rendering a

^① 145 U. S. 263.

^② 167 U. S. 512.

^③ 230 U. S. 247, 260.

service the carrier was not bound to furnish, was a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute, and for which the guilty carrier was subject to criminal indictment, and for which damages could have been awarded on the civil side of the court. In other words, the Supreme Court held that the payment of cartage to one shipper and not to others, in connection with the transportation of a like kind of traffic in like and contemporaneous service, was a rebate “under substantially similar circumstances and conditions,” and in violation of Section 2 of the Act.

Competition of Carriers Not a Defense. This doctrine, which held that the section aimed to put all shippers within a switching district upon a substantial equality and that competition of rival carriers, as such, does not constitute substantially dissimilar circumstances to justify a difference in treatment, cited by the Commission in the *Richmond Chamber of Commerce Case*,^① was confirmed by the Supreme Court of the United States.^②

In the *Richmond Chamber of Commerce Case* it was found that the Southern and the Seaboard railways made a practice of absorbing each other's local switching charges at Richmond on competitive traffic only. The Commission compelled them to absorb the switching charges of the Chesapeake & Ohio also, on traffic destined to shippers served by that carrier.

The doctrine of the *Wight Case* has been misunderstood and misstated. Attention is directed to the fact that the competition referred to in that and in the *Richmond Switching Case*, is carrier competition, which has nothing to do with the actual carriage itself. This differs from shipper competition. The Commission's decision in the *Tide Water Oil Co. Case*^③ correctly stated that the absence of shipper competition does not prevent a finding of unjust discrimination under Section 2.

^① 44 I. C. C. 455, 464.

^② 254 U. S. 57.

^③ 62 I. C. C. 226.

The presence of carrier competition does not make the circumstances and conditions dissimilar.

Use of Rate Comparisons. Ordinarily rate comparisons, such as are competent and probative in cases involving unreasonableness under Section 1 or undue preference under Section 3, have no bearing in cases of discrimination under Section 2. In a case involving an allegation of Section 2 alone, any exhibits comparing the rates assailed with the rates on like traffic or on other commodities between different points of origin and destination, would be irrelevant and immaterial. However, in the usual run of cases, allegations under Section 2 are frequently combined with allegations under Section 1 and Section 3, and it is doubtful, in such cases, whether any evidence offered in the nature of rate comparisons could be excluded. Whatever evidence is offered may be employed for argument in support of any issue to which it may be relevant and material, but comparisons of rates, revenues, and distances seldom have any bearing upon unjust discrimination under Section 2.

In a Section 2 case, the proof, which should be specific, should show:

1. The identity of the persons between whom the discrimination is alleged.
2. The general character of their business in the same community.
3. What the points of origin and destination are, and that they are the same.
4. That the traffic and also the service, is "like" in character and "contemporaneous."
5. That the transportation is performed "under substantially similar circumstances and conditions."

Reparation Under Section 2. The measure of damages in cases under Section 2 and Section 3 is entirely different from the measure of damages in Section 1 cases, and the

nature of the proof is correspondingly different. The doctrine of damages for discriminations under Section 2 can scarcely be distinguished from the doctrine of damages for undue prejudice under Section 3. Because of the relatively greater importance of Section 3 than of Section 2, only a short summary of the principles governing the proof to be made in Section 2 cases is given here, leaving the major discussion of the subject to be treated under the discussion of Section 3.

Damages Not Automatically Fixed. In Section 1 cases, where the Commission makes a finding that a certain rate was unreasonable to the extent that it exceeded a certain reasonable rate, the measure of the damages is the difference in charges based upon the difference in the rates. In a Section 2 case, where no other issue is involved, the Commission's finding of discrimination does not automatically fix the measure of the damages, as in Section 1.

From the standpoint of the situation described above in the *Wight Case*,^① the fact that the complaining party paid the published rate under usual and ordinary trade practices, does not provide a measure of the damages which he may claim, due to the fact, that the party to whom the cartage charge was allowed received a rebate. There is no presumption that the complaining party paid too much for the services rendered. There is no difference in the published rate which affords an automatic measure of the damages under these circumstances.

The only presumption is that the party who received the rebate should not have received it. To what extent, then, was the complaining party damaged? Shall he claim that the damages to him should be measured by the amount of the cartage charge? If so, how can he connect his commercial transactions with the rebate to the other party, in order to show that the rebate actually injured him?

^① 167 U. S. 512.

Proof of Pecuniary Loss. Proof of damages under these condition would be difficult. The complainant would have to show that he made or received contemporaneous shipments of like traffic, from the same point of origin to the same destination; that a cartage charge was paid to the other shipper and not to him; that he and the other shipper were in competition with each other; and finally that the payment of the cartage to the competitor and not to him operated to his pecuniary injury in some way. He might, for example, show that he was thereby caused to lose business or to lose profits on shipments which he could otherwise have made or did make; or that he had incurred extra expenses of cartage for which his competitor received reimbursement in the form of a rebate. If, however, as might have been the case, the complainant received delivery at his own warehouse and incurred no cartage expense, it is difficult to conceive how he was pecuniarily injured by the discrimination.

Proof of Competition.. In discussing Section 2 it was stated that, under facts such as those in the *Wight Case*, it is not essential to make proof of competition as a condition precedent to a finding of discrimination under Section 2. However, in proving a claim of damages under these facts it would be necessary to prove competition in order to show loss of business, loss of profits; or extra expenses incurred. In other words, the payment of cartage in the form of a rebate can be proved and criminal penalties can be invoked under Section 2, under a finding of discrimination, upon a showing that the rebate was paid to one person without tariff authority, while on similar shipments to others no such rebate was paid, without the necessity of proving any competitive relation between the party who received the rebate and the other shippers located at the same point.

Probative Value of Competition. The value which attaches to competition, as an element of proof in Section 1,

Section 2, and Section 3 rate cases is briefly summarized and stated in the following general rules:

1. In Section 1 cases, *competition* is not an element of proof, either as to the unreasonableness, or as to the proof of damages.
2. In Section 2 cases, *competition* is not an element of proof, with respect to the "discrimination," but is an element of proof necessary to establish a claim for damages.
3. In Section 3 cases, *competition* is an essential element of proof, both as to the undue prejudice, and also as to the claim for damages.

PRACTICAL APPLICATION

Problem. The Winters Metallic Paint Co., which manufactures ground iron ore at Neda, Wis., alleges, in complaint filed with the Commission, that rates charged on shipments to Bensenville and East St. Louis, Ill., are unjustly discriminatory. In support of this contention it is stated that competitors at Bensenville and East St. Louis, who manufacture metallic paints from ground iron ore have an undue advantage in that, from Neda to Bensenville and East St. Louis, the rate on crude iron ore is considerably lower than the rate on ground iron ore. Further, that the rate on hard coal from Chicago to Neda is higher than the rate on crude iron ore from Neda to Bensenville. Complainant contends that as a consequence his cost of manufacture is relatively greater than that of competitors at Bensenville and East St. Louis, and that this results in unjust discrimination.

Is this a relative comparison and in your opinion does unjust discrimination exist?

Solution. The two commodities, crude iron ore and ground iron ore, are not like kinds of traffic within the meaning of Section 2 of the Act, and the allegation of unjust discrimination is wholly unfounded. The circumstances and conditions surrounding the transportation of these commodities are so dissimilar that lower rates are warranted on crude ore than on ground ore.

The rate paid by complainant on coal is not in any sense related to the rate paid on crude iron ore by the competitors at Bensenville.

Chapter II

PROOF OF VIOLATION OF SECTION 3

IN contrast to Section 2, which is aimed at discrimination and rebates, Section 3, paragraph 1, of the Interstate Commerce Act, stated in general terms, seeks to prevent and correct relative inequalities in rates from two or more competitive points of origin to one or more respective common destinations, or from one or more respective points of origin to two or more competitive destinations, where the competition is between persons or localities, and to prevent and correct relative inequalities in rates from and to the same points of origin and destination on competitive commodities.

Distinction Between Section 2 and Section 3. A given set of facts in connection with which an issue of discrimination under Section 2 was proved might also serve to prove a violation of Section 3, for the reason that Section 3 is much broader in scope than Section 2, and has not the specific limitations attached to it which characterize Section 2. The outstanding distinction between the two sections is that Section 2 is primarily directed to discriminations against shippers located in the same community, whereas Section 3 is primarily designed to prevent undue preference of one community, or shippers located therein, and prejudice against other communities, or shippers located therein.^①

Kinds of Preference. While Section 2 is limited to discriminations between persons, and Section 3 prohibits undue preferences between localities, the latter section is not confined to locality preferences. This section also

^① *Richmond Chamber of Commerce Case*, 44 I. C. C. 455, switching under Section 2; and *Pacific Lumber Co. Case*, 51 I. C. C. 738, lumber localities under Section 3.

prohibits "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The preferences aimed at in Section 3 may be described briefly as those given to localities, persons, and commodities. It is the presence of these three types of preferences, and the absence of any restrictions or limitations, such as "under substantially similar circumstances," which make Section 3 the most effective of all the remedial provisions of interstate commerce legislation, excepting only the "reasonable rate" provision of Section 1.

Proof of Competition Essential. Proof of competition between the complaining point, person, or commodity, and the alleged preferred point, person, or commodity, respectively, is a prime requisite for the establishment of any violation of Section 3, as well as for a claim for damages based thereon. "Prejudice is rarely undue unless the parties prejudiced and those preferred are upon a competitive basis," the Commission said in the *Detroit & Cleveland Nav. Co. Case*.^① The kind of competition referred to is shipper competition or locality competition and not carrier competition.

Carrier Competition. Where rate inequalities are attacked and the defense of carrier competition is made, the question to be determined by the Commission necessitates the measuring of the benefits and advantages to the carrier, arising out of carrier competition, on the one hand, against the prejudice and disadvantage to the complaining shipper or locality, on the other. The general doctrine in such cases is that the carrier competition must

^① 102 I. C. C. 607, 609.

give way in order that prejudice between shippers and localities may be removed. The defense of carrier competition was made in the *Marshall Mill & Elevator Co. Case*, a Section 3 transit case, and the Commission ordered the prejudice removed, stating:^①

In our view the competitive situation stressed (by defendants^②) is not adequate justification for the disadvantage to which Marshall and shippers there located are subjected by the present transit arrangements in this territory.

Commodity Competition. In the *Morrell & Co. Case*, the Commission pointed out, however, that:^③

While commercial conditions and carrier competition are factors to be considered in determining lawful rates, they should not be given such importance as completely to outweigh factors more directly related to transportation, such as the cost and value of the service.

The relationships involved under Section 3 in that proceeding were in the rates on livestock as compared with those on fresh meats and packing-house products. Thus, the competition and prejudice alleged in that case was between commodities.

Locality Competition. Proof of competition between localities often rests upon presumptions of fact rather than upon business transactions. For example, the rates on certain commodities from Nashville, Tenn., to Cincinnati, Ohio, may be relatively maladjusted with respect to the rates on the same commodities from Chattanooga, Tenn., to Cincinnati. A complaint brought on behalf of the city of Nashville, alleging preference of the city of Chattanooga, would have as its foundation the presumption of competition between the cities, not in the sale of these commodities, but in the growth of the cities.

The growth of the city has no direct bearing upon commercial competition in the sale of the goods transported,

^① 101 I. C. C. 270, 272; see also *United States v. Illinois Central R. R.*, 263 U. S. 515.

^② Inserted by author.

^③ 104 I. C. C. 104, 134.

but if the rates are not fairly related, there is a presumption of fact that the city of Nashville will not grow as rapidly or as successfully, as the city of Chattanooga. By reason of this presumption of competition in growth between rival cities, we may state the general principle that competition between localities requires no elaborate or detailed proof, but rests largely upon presumptions of fact. In the *Sioux Falls Livestock Exchange Case*,^① the Commission said:

It appears from the record that Sioux Falls as a locality or community is endeavoring to build up a livestock market, and that in doing so is confronted by the competition and entrenched influence in the business of the long-established markets in this territory, St. Paul, Sioux City, Omaha, and Kansas City. In a case of this character elaborate evidence is not required to show that complainants are entitled to relief if the rates are not properly related. *Intermediate Rate Assn. v. Director General*, 61 I.C.C. 226, 233; *Pioneer Lumber Co. v. Director General*, 64 I.C.C. 485, 489.

Actual v. Potential Competition. Ordinarily, in proving undue prejudice reliance may be placed upon ability to show actual competition. What has been said above with respect to competition relates largely to actual competition. In some instances the competition may be hybrid in form and partake of the nature of both actual and potential competition. For example, two manufacturers of pipe, located at different points, may compete in a certain destination territory where their rates are fairly related, but the rates to another destination territory may be so far out of line that one of the manufacturers is unable to make any sales there. In this case there is actual competition between the complainant and the other manufacturer in sales to the one market but not to the other. The fact that the rates to the second territory are unfairly related may be the very circumstance which keeps the complainant out of that market.

While the competition in this illustration may be regarded as strictly potential, nevertheless testimony is

^① 109 I. C. C. 501, 512.

admissible to show actual competition between the two manufacturers at other points. This evidence has a strong bearing upon the fact that the complainant would make shipments to the point in issue if the rate adjustment were corrected. Such proof makes the showing of potential competition unusually strong. The Commission has ordinarily required a showing of actual competition, but in a number of cases it has made findings of undue prejudice based upon this form of hybrid competition and also upon weaker cases where the only competition proved was entirely potential.

Carriers Must Be Parties to Routes. In many cases involving joint rates assailed under Section 3 of the Act, the defendants have interposed the argument that a carrier cannot be guilty of undue prejudice when it does not participate in the through route, when it does not serve all of the points of origin and destination in controversy, or when it serves only one but not all of the points. These defenses have raised many difficult problems of fact. For a number of years there seemed to be doubt in the Commission's mind as to whether a carrier could be held guilty of undue prejudice concerning a point not reached by its line. That view has gradually disappeared with the passing of time. In *Southern Pacific Company's Ownership of Oil Steamers Case*,^① the Commission said:

By participating in joint rates each carrier in a measure becomes responsible for the actions of the other participating carriers, and the joint transportation via the different lines is an arrangement under which each of the carriers participating therein is, in fact, serving any point to or from which the joint rate applies.

Participation in Movement Necessary. The decision in the above case has been misunderstood to mean that mere participation in the tariffs makes every carrier party thereto amenable to a Section 3 finding. By "participating in joint rates," the Commission meant participating

^① 34 I. C. 77, 80.

in the actual transportation to which the joint rates apply.

Perhaps the leading and most important case upon the question of participation in through movements is the *Paducah Case*, in which the Supreme Court of the United States upheld the Interstate Commerce Commission.^① The principle involved was stated in general terms by the Supreme Court as follows:

The carriers insist also that the order (of the Commission requiring the removal of undue prejudice against Paducah^②) is void on the ground that, since their rails do not reach Paducah they cannot be guilty of discrimination against that city. They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it.

The proof must show what lines actually handle the traffic from and to the points where the prejudice is alleged, and also from and to the points where the preference is alleged to exist. The complaint, if properly drawn, will have all of these lines named as defendants. If the defendants participate in the through movement, that is the essential fact and not whether joint rates are in effect, or whether combinations are in effect for the through movements. Participation of these carriers in the tariffs is a matter of form, not of substance.

One illustration of the above principles suffices here. For example, suppose that a complaint alleges undue prejudice to Memphis and undue preference to Chattanooga on traffic to Atlanta, and that the haul is over the Southern Railway from Memphis to Atlanta, and over the Nashville, Chattanooga & St. Louis system from

^① *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136. For a more complete discussion of this case and diagram of the lines, see discussion of undue prejudice in manual, **INTERSTATE COMMERCE ACT—SECTIONS 2 TO 13, INCLUSIVE**.

^② The explanatory matter in the parentheses is the author's.

Chattanooga. The fact that the rates from both Memphis and Chattanooga to Atlanta may be carried in one tariff, in which both the Southern and the Nashville, Chattanooga & St. Louis railways participate as concurring lines, could not make them amenable to a finding of undue prejudice, assuming that the Nashville, Chattanooga & St. Louis did not serve Memphis and that the Southern did not serve Chattanooga on traffic billed direct to Atlanta.

In this instance neither carrier would have any control over the rates from the origin which it did not serve, and neither carrier would participate in the through movement from both points, although both serve Atlanta. Neither carrier could be held responsible for the acts of the other. No finding of undue prejudice could be lawfully made under these circumstances.

However, if the destination were a local point in Georgia served only by the Southern, and if the Southern carried local rates from Memphis in one tariff and participated with the Nashville, Chattanooga & St. Louis in joint rates from Chattanooga to its local points, then the two carriers, the Southern and the Nashville, Chattanooga & St. Louis, would be amenable to a finding under Section 3. In this instance the Southern is a necessary carrier in the transportation from both points of origin. The latter set of facts is similar to those upon which the *Paducah Case* was decided.

Commission May or May Not Issue Order. Under certain circumstances carriers participating in through movements are amenable to Section 3 findings, but, due to the presence of separate competing lines from one point of origin to a common destination, the issuance of an order by the Commission would result in no practical benefit to the prejudiced point. This principle has been identified by the name of the leading case upon this sub-

ject, namely, the *Ashland Fire Brick Case*.^② In such cases the Commission will not make an order of undue prejudice.

The facts are necessary to a clear understanding of the Ashland principle. The rates were lower from St. Louis to Birmingham than from Ashland, Ky., to Birmingham. Certain parts of the Southern Railway system participated in through movements both from Ashland and from St. Louis, and therefore the situation would have been subject to correction by the issuance of an order of the Commission under Section 3. The Frisco Lines, however, formed a route from St. Louis to Birmingham, which was in no way connected with the haul from Ashland to Birmingham. If the Southern Railway were required to remove the prejudicial relationship in rates it would have had the alternative of either increasing the rate from St. Louis over its line or reducing the rate from the Ashland district.

The Southern's position was that it would comply with such an order by increasing the rate over its line from St. Louis, and that this action would result in diverting to the Frisco or other roads all of the tonnage from St. Louis, leaving Ashland shippers no better off than they had been. Thus, it would be futile to compel the Southern to raise its rate from St. Louis and thereby to forego the traffic which it had been handling, when no benefit would accrue to the Ashland complainant.

Ability of Carrier to "Cure" Discrimination. The Ashland principle, which leads to the oft-repeated statement that the issuance of an order of the Interstate Commerce Commission under a Section 3 finding depends upon the ability of one or more of the carriers to "cure" the discrimination by its or their own act, has been frequently misquoted and misunderstood. Attention is directed to

^② 22 I. C. C. 115.

this distinction: The Commission had the power to issue a Section 3 order in the *Ashland Case*, but the reason for not doing so was that the increase in the St. Louis rate by the Southern Railway would not change the rate over the Frisco, and would not "cure" the situation so far as the complainant was concerned. The Frisco took no part in the transportation from the complaining point and could not be held responsible for the discrimination.

The evidence of the complainant in a Section 3 case should include a diagram of the lines, the routes from and to the preferred, as well as the prejudiced points, and should show the ability of some one or more of the carriers participating in the through movement to control the discrimination or preference.

PRACTICAL APPLICATION

Problem. The Clarksburg Box and Lumber Co. manufactures box shooks and wire-bound box material, at Clarksburg, W. Va. In a complaint filed with the Commission it is alleged that the rates on wire-bound box material, in carloads, applying via Clarksburg from points of origin on the Baltimore & Ohio R. R. in West Virginia to interstate destinations on its line are unduly prejudicial to that commodity and unduly preferential of box shooks; and that the failure of the Baltimore & Ohio R. R. to accord dressing-in-transit arrangement on wire-bound box material at Clarksburg is unduly prejudicial to complainant and unduly preferential of complainant's competitors at Cincinnati, Ohio.

The dressing-in-transit arrangement in effect permits lumber to be converted into wire-bound box material at Cincinnati and the through rate on the box material, which takes lumber rates, applied from point of origin to ultimate destination. The through rates on lumber, including box shooks, do not apply on wire-bound box material. The complainant at Clarksburg is required to pay on a combination of rates to and from Clarksburg.

The transit arrangements at Cincinnati are not restricted to traffic from and to points on the line of the Baltimore & Ohio but apply also on such traffic from and to points on such other lines as take joint rates via Cincinnati in connection with the Baltimore & Ohio. The Baltimore & Ohio R. R. contends that the Commission cannot make any order in this case affecting traffic moving from origins or to destinations on other lines.

Do you agree with this latter contention? Do you believe that complainant has offered sufficient proof to substantiate its claim of undue prejudice to it and preference to competitors at Cincinnati?

Solution. The contention of the Baltimore & Ohio is without merit, inasmuch as the transit arrangements at Cincinnati are not restricted.

The failure of the Baltimore & Ohio to accord dressing-in-transit arrangements to wire-bound box material at Clarksburg, while according this commodity such arrangements at Cincinnati, was unduly prejudicial to complainant and unduly preferential of competitors at Cincinnati. This was the holding of the Commission^① wherein it said:

If defendant should elect to remove the undue prejudice with respect to transit by according such arrangements to wire-bound box material at Clarksburg, it should, of course, subject such arrangements to no greater restriction or less favorable terms and conditions than those in effect in connection with the said commodity at Cincinnati.

Chapter III

PROOF OF VIOLATION OF SECTION 3 (Continued)

SEVERAL important matters, in addition to those discussed in the preceding chapter, arise in connection with proof of Section 3 violations. Among these are the following pertinent questions: Is only *undue* preference or prejudice unlawful? Is undue preference a question of fact or law? Under what circumstances will reparation be awarded in cases involving Section 3 violations? These and other problems are considered in detail in the following paragraphs.

Only Undue Preference or Prejudice Unlawful. The courts and the Commission have frequently held that not all preferences are unlawful under Section 3. The preference and prejudice must be undue. The Supreme Court said in *Texas & Pacific Railway v. Interstate Commerce Commission*:^①

The mere circumstance that there is, in a given case, a preference or advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act.

In proof of an issue under Section 3, it is not sufficient that the complainant show a mere difference in rates and rest his case. There must be positive evidence with respect to the transportation and traffic conditions and with respect to actual competition, or potential competition where the complainant is in a position to compete if the prejudice is removed. There must also be some assurance to the Commission that the relief sought would affect, in some substantial way, the complainant's business

^①162 U. S. 197.

and that the defendant carriers are in a position to control the rate situation by their own act.

Undue Preference a Question of Fact, Not Law. The discussion in the preceding paragraph logically leads to the statement of the legal principle:

Undue preference or unreasonable prejudice is a question of fact and not of law.

In the case above cited the Supreme Court said:

. . . there is nothing in the act which defines what shall be held to be undue, reasonable or unreasonable, such questions are questions, not of law, but of fact.

For this reason exclusive original jurisdiction is vested by Congress in the Interstate Commerce Commission, to decide and determine, in the exercise of its judgment upon the facts in each case, whether an undue preference or unreasonable prejudice exists.

Preference Must Arise from Rate Structure. While matters of commercial competition are necessary elements of proof in Section 3 cases, the question of whether undue preference exists is one which must rest largely upon the relationship of rates. Thus, it must be determined largely upon the question of relative transportation services, expenses, length of hauls, number of carriers comprising the routes, volume of the traffic, and other usual tests employed in rate making.

Shipper May Not Be Deprived of Natural Advantages. The natural location of an alleged preferred plant as compared with that of an alleged prejudiced plant, may be such as to warrant a lower rate on account of lower transportation costs. If so, the Commission is not empowered by the Act to fix rates which ignore transportation questions and deprive the one shipper of the benefit of his natural location in order to place the complaining competitor upon an equality of rates.

In *Port Arthur Board of Trade Case*,^① the Commission said:

The natural disadvantages of Port Arthur as compared with Galveston and Texas City are adverted to and admitted by complainant in petition and in testimony.

The disadvantages of Port Arthur are natural. They are not created by defendants or other transportation agencies. They remain after private enterprise and energy, as demonstrated by the construction of an artificial waterway or canal to a connection with the natural waters of the Gulf, have done what they could to overcome the natural disadvantages which originally marked the location of the town.

In the face of these facts complainant cannot be heard to demand that the disadvantages which remain and render impossible full and complete competition with other and more favorably situated ports shall be removed by requiring the establishment of preferential rates to Port Arthur.

. . . . We have consistently held that it is not our province to adjust rates for the purpose of equalizing natural or commercial advantages. Neither may the carriers lawfully do so. *Red River Oil Co. v. T. & P. Ry. Co.*, 23 I.C.C. 438. The Interstate Commerce Act is not intended to equalize fortune, opportunities, or abilities. *I.C.C. v. Difffenbaugh*, 222 U.S. 42, 46.

Force of Rate Comparisons in Section 3 Cases. In an allegation under Section 3 the most important factor of proof is the comparison between the rate from and to the alleged prejudiced points and the rate from and to the alleged preferred points. There is an important difference between the fundamental purpose of comparisons in a Section 1 case and in a Section 3 case. In a Section 1 case the rates selected for the comparisons are not in issue and cannot be affected by any decision in the case, and the comparative rate is entirely collateral evidence, employed for the purpose of measuring the amount of the rate. In a Section 3 case, on the other hand, the principal rate or rates used in the comparisons are in issue to the extent that they may be affected by the decision, but the quantum of the rates is not involved.

Effect on Rates to and from Preferred Points. In a Section 3 case, the rates from and to the alleged preferred points are not, strictly speaking, placed in issue by the

pleadings. The complaint seeks relief only with respect to the alleged prejudiced points. However, the courts have held that under a Section 3 allegation standing by itself, the Commission, in making an affirmative order, would have to make the order in the alternative, so that the carrier could elect either to reduce the rates from and to the prejudiced points or increase the rates from and to the preferred points. It is for this reason that the rates from and to the preferred points, although not directly included in the prayer of the complaint, may, nevertheless, be directly affected by a Section 3 order, if the carriers choose to cure the prejudice by increasing the rates from and to the preferred points.

If the complaint brings in issue an allegation under Section 3 alone, then the comparisons must be confined to those which have as their purpose the object of showing the relationship between the rates. Any evidence going to the quantum of the rates would be inadmissible.

Where a complaint is brought under allegations of both Section 1 and Section 3, any comparisons which are offered can be employed both with respect to the quantum and the relationship of the rates.

Other Provisions of Section 3. In the foregoing discussion of Section 3, paragraph 1, no mention has been made of a number of less important, and seldom employed, provisions of Section 3. Thus, nothing has been said with regard to paragraph 2, which provides that freight shall not be delivered until the charges are paid; or paragraph 3, which provides that there shall be no discrimination between connecting lines as to the facilities for the interchange of traffic; or paragraph 4, which provides that the Commission may require the common use of terminals and fix the terms and compensation therefor. However, while it is essential to bear these provisions in mind, it is unnecessary to discuss them.

Reparation Under Section 3. This subject has been cov-

ered in a general way in the discussion of reparation under Section 2, and the similarity of reparation under these sections has been explained. However, the subject is discussed here, in detail, because reparation claims in Section 3 cases are by no means unusual, although the awarding of reparation, under Section 3 findings, by the Commission does not occur frequently.

The Commission's attitude and the courts' decisions, with respect to reparation under Section 3, have often been misunderstood and misconstrued. For a number of years past, there seemed to be a general impression that the Commission would not award reparation under a Section 3 finding. This impression is groundless. The Commission has awarded reparation in a number of important cases decided under Section 3 alone. It is true, however, that reparation has been denied in a larger number of Section 3 cases than it has been awarded, but this fact can be ascribed largely to the failure of the complainants to make the proof of damages as definite and certain as in a court of law.^①

Denial Due to Insufficient Proof. Reference to recent decisions discloses that reparation is often denied under findings of undue prejudice due to the failure of the complainant to prove essential facts. In the *Memphis Freight Bureau Case*,^② the Commission denied reparation on the ground that the mere showing that a part of a rate was absorbed in the selling price was not sufficient proof. In the *South River Lumber Co. Case*,^③ the evidence in support of an allegation of undue prejudice consisted of general statements to the effect that the complainant was in

^① *Anadarko Cotton Oil Case*, 20 I. C. C. 43. The leading cases in which reparation has been awarded under Section 3 findings are:

<i>Buffalo Union Furnace Co. Case</i>	44 I. C. C. 267
<i>California Pine Box & Lumber Co. Case</i>	47 I. C. C. 372
<i>Inman Poulsen Lumber Co. Case</i>	61 I. C. C. 185
<i>Johnstown, Pa., Switching Case</i>	43 I. C. C. 654
<i>Pittsburgh Steel Co. Case</i>	39 I. C. C. 312
<i>Stewart Iron Co. Case</i>	47 I. C. C. 512
<i>U. S. Cast Iron Pipe & Foundry Co. Case</i>	44 I. C. C. 757
<i>Nelson Fuel Co. Case</i>	120 I. C. C. 723

^② 101 I. C. 26.

^③ 109 I. C. 173, 175.

competition with an industry at the alleged preferred point, and that because rates from the preferred point were lower and the commodity was sold on a delivered basis, a discrimination existed in favor of the competing point. The Commission held that this evidence fell far short of that certainty of proof required by law to entitle a complainant to damages for an alleged violation of Section 2 or Section 3 of the Act.

Steps in Proof of Damage. The first essential step in proof of damages under Section 3 is the presentation of the necessary facts showing that the carrier or carriers have committed the *public wrong*.

The second step is the proving that the public wrong has in fact operated to complainant's injury, that is, *private injury to persons*.^①

The third step is the proving of the nature, extent, and amount of the damages, resulting from the *private injury* growing out of the *public wrong*.

Kinds of Damages. The nature or kind of damages may be *rate damages*, which are measured by the difference between the rate from the prejudiced point and from the preferred point to the destination. This is the most usual kind of damages sought under Section 3. Other forms are special and general damages. In a rate case, general damages would ordinarily be those which result from a difference in rates, as the proximate cause of the injury, but which do not include, or are in addition to, the rate damages.

Award of Damages. The power of the Commission to award general damages growing out of violations of Section 3 of the Act cannot longer be questioned. In the leading case on this subject, the Supreme Court of the United States said:^②

^① *Parsons v. Chicago & North Western Ry.*, 167 U. S. 447.

^② *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 200, 201. The italics and parenthetical matter are the author's.

.... Indeed it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, while this statute (Interstate Commerce Act) *does give a clear, definite, and positive right to recover for unjust discrimination* (meaning both sections 2 and 3)....

The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the *injury* sustained.

Continuing, with respect to the proof of damages under Section 2 and Section 3, the Supreme Court said in the same opinion:^①

.... It is elementary that in a suit at law both the fact and the amount of the damage must be proved.

.... But the *public wrong* did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier *liable for the full amount of damages sustained*, whatever they might be and whether greater or less than the rate of rebate paid.

The power of the Commission to award general damages under Section 2 and Section 3 was also positively stated in the *Ohio Valley Tie Case*.^②

NATURE OF DAMAGES. The *International Coal Case*, quoted above, definitely laid down the specific doctrine that the Commission can award general damages; that the proof must be specific, both as to the public wrong and the private injury; that the nature and extent of the damages must be proved; and that the nature of the damages may be one of the three general classes, "loss of business, loss of profits, or extra expenses incurred."

The court used the word "or," which clearly means that the claim may rest upon any one of these three classes.

^① The italics and the parenthetical matter are the author's.
^② 242 U. S. 288.

The court did not say, and did not mean, that the shipper would have to prove his claim under all three classes. The reason for this is obvious. If the shipper lost the business, he would not have actually lost any profits; he would have had to calculate what the profits "might have been." He could not prove that he actually lost profits on transactions which he was prevented, by the prejudice, from making.

Again, if he was put to an extra expense, such as ~~cartage~~, whereas his competitor had no cartage to pay, he would claim the amount of the cartage only as extra expenses. It would be foolish to expect him to prove loss of business when he is not claiming damages from loss of business, or to prove loss of profits, when he is not claiming loss of profits. If the expense of cartage is the extent of the injury, that is all that he is entitled to claim and all that he would have to prove. The presumption is, under these facts, that if he carted his shipments he did not lose the business, and if he did not lose the business he did not lose his profits.

Where the extent of the damages claimed is the difference in rates, the claim falls under the head "extra expenses incurred." The extra freight charges are the extra expenses.

In *Pennsylvania R. R. Co. v. Weber*,^① decided November 7, 1921, the Supreme Court of the United States held that although the award of the Commission was based upon an erroneous calculation, in a suit upon a reparation order of the Commission, based upon a finding of illegal discrimination (undue prejudice) in the distribution of coal cars, the shipper had the right to recover where there is testimony fairly tending to show that a recovery of damages in a sum at least equal to the Com-

^① 257 U. S. 85.

mission's award was justified because of unfair practices in the distribution of coal cars in time of shortage.

Nature of Evidence Necessary. The exact nature of the evidence necessary to substantiate a claim for damages under a Section 3 finding, varies materially according to the particular facts and circumstances surrounding each case. The ideas discussed above are presented in very definite form in the decision in the *Inman-Poulsen Lumber Co. Case*,^① cited above, which was decided by the entire Commission on rehearing and reconsideration. The Commission had previously made the finding of undue prejudice. The complainant cited this in proof of the *public wrong*. Upon the rehearing on reparation the Commission found that:

There is uncontested evidence that immediately after October 22, 1915, when the 17.5 cent rate was put into effect on fir and hemlock lumber, and lath from the Willamette Valley to San Francisco Bay points, and other intermediate points, the Willamette Valley mills dropped their selling prices to the full extent of the reduction in freight rates; that they set the price at which complainants were obliged to sell, and that complainants met the full reduction in price by absorbing the difference in freight rates in order to hold their business.

The mill prices were the same at both the Willamette Valley and the Portland mills, but the freight rates from Portland to the destination territory were 0.25 cents to 4 cents higher than those paid by complainants' competitors for substantially similar service. Previously the rates had been the same. The sales that were made to such points netted complainants the same amounts as the Valley mills received, and of course no reparation is claimed as to such shipments.

At the time the shipments moved complainants were engaged in manufacturing the same kinds of lumber as their competitors in the Willamette Valley which was sold in the same general competitive markets; they were forced to and did meet the reduced prices at which their competitors sold, and under such circumstances it was impossible to add the differences in the freight rates to their selling

^① 61 I. C. C. 185.

prices. Complainants were compelled to absorb such differences out of their profits. They have now shown with reasonable certainty that they were compelled to forego certain profits solely because the freight rates from Portland exceeded the rates contemporaneously available to their competitors in the Valley on like traffic, and that they have suffered a pecuniary loss as a result of the additional transportation charges paid. It follows therefore that the Willamette Valley rates were the proximate cause of the injury, which the complainants sustained following the establishment of those rates, and their damage is measured by the difference in freight rates.

We find that complainants made the shipments as described and paid and bore the charges thereon at the rate which was found in the original reports herein to have been unduly prejudicial; that they have been damaged to the extent that the charges collected exceeded the charges that would have accrued at the rates contemporaneously applicable from the Willamette Valley. . . .

A careful study of the facts submitted in evidence, upon which the above findings were based, employed in connection with any new set of facts, should enable the experienced practitioner to prove his claims for damages under Section 3 with the same degree of certainty as in a court of law.

Great care must be taken in a Section 3 hearing to cover each of the essential factors of proof. The Commission is inclined to throw out Section 3 claims wherever it can find any technical weakness in the chain of proof.

PRACTICAL APPLICATION

Problem. In complaint filed with Commission, Hayward & Bowman asked for reparation claiming that the rate of 62.5 cents charged on three carloads of barley from Subaco, Calif., to New Orleans, La., was unduly prejudicial to the extent it exceeded the subsequently established rate of 56 cents which was contemporaneously maintained on barley from an extensive territory including points surrounding Subaco.

Complainants supported their contention with a statement that competitors shipped barley from other stations in California that took the 56 cent rate to Gulf ports, but they had no definite knowledge of the prices paid or received for such shipments. They fur-

ther stated that there was a considerable foreign demand for barley at that time and no difficulty was experienced in making sales, and the selling price was not controlled strictly by competition. Reparation was denied. What essential facts did complainants fail to produce to entitle them to the reparation asked for?

Solution. The statements made by complainants are general, and there is no proof of damage such as is required to support an award of reparation under a finding of undue prejudice.

Chapter IV

PROOF OF VIOLATION OF SECTION 4

THE next class of rate cases to be considered are those complaining of violations of Section 4. In connection with this discussion of the grounds of proof under such cases, attention is called to the explanation of the Fourth Section as given in the manuals on the INTERSTATE COMMERCE ACT.^①

It is safe to say that no one section of the Act, when applied to particular facts, presents so many complexities and intricacies as Section 4. The purpose here is not to delve deeply into the ramifications of thought presented by Section 4, but merely to present the fundamental points which are most usually encountered.

Purpose of Section 4. The purpose of Section 4 is two-fold; first, to prevent the charging of higher rates to intermediate points on a given line, for movement in the same direction, than to the farther distant points, designated in traffic parlance as the "long-and-short-haul provision"; and, second, to prevent the charging of greater compensation as a through rate than the aggregate of the intermediate rates, known as the "sum-of-intermediates" or "aggregate-of-the-intermediate rates" provision.

Long-and-Short-Haul Provision. The Act prohibits long-and-short-haul violations, but provides that upon application of the interested carrier or carriers the Commission may authorize the applicant to charge less for the longer distances.

The Commission is also empowered to change, from time to time, the nature and extent of any relief which

^① INTERSTATE COMMERCE ACT—SECTIONS 2 TO 18, INCLUSIVE.

it may have granted, subject to certain specific limitations upon this power. The rate to the farther distant point must be reasonably compensatory for the service performed and, where relief is granted because the route is circuitous, the rate to the more distant point shall not be exceeded from and to points on that line which are no farther apart than the distance over the short line to the farther distant point. This provision, which is known as the "circuitry" provision, is here stated in different words from those used in the statute. The statutory provision contains a double negative which makes the meaning of the provision elusive and hard to understand without rereading and concentration.

The graphic charts in Figure 1 and Figure 2,^① illustrate

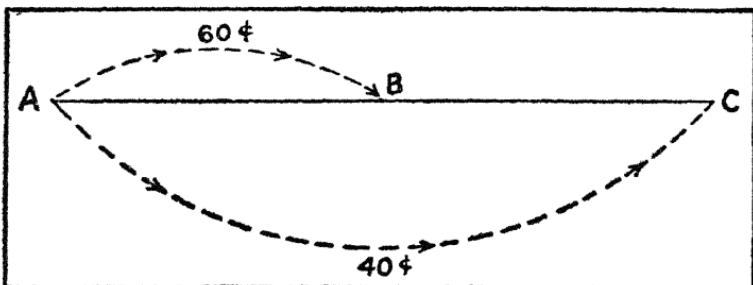


Figure 1. A Fourth Section situation exists, as illustrated in this diagram, where the rate to the farther point is 60 cents and the rate to the intermediate point is 40 cents.

the application of the long-and-short-haul and the circuitry provisions of Section 4.

Evidence in Fourth Section Allegation. The evidence, in proof of an allegation of a violation of the long-and-short-haul provision must first show the rate from A to B, which is 60 cents in Figure 1, and the tariff references to this rate. The distance from A to B should also be given, and the name or names of the carrier or carriers comprising the short-line distance from A to B. Next, the rate from A to C (the farther distant point) must be

^① Reproduced from manual, INTERSTATE COMMERCE ACT—SECTIONS 2 TO 13, INCLUSIVE.

given, with the tariff reference therefor, showing that the lower rate is applicable over the same line, in the same direction, on the same kind of traffic, as from A to B.

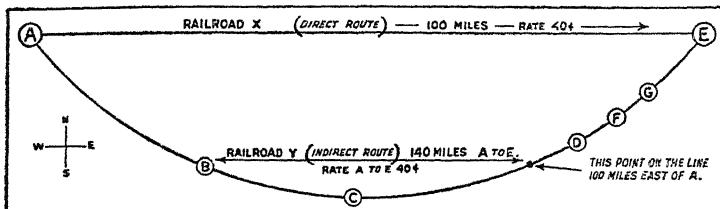


Figure 2. The circuitry provision of Section 4 is applied to the situation illustrated in this diagram by requiring Railroad Y to establish a rate not higher than 40 cents from A to a point on its line 100 miles east of A, this rate and distance being the same as from A to E via Railroad X.

The distance from A to C and from B to C should also be given, with authority therefor. These facts will show that the shorter is included within the longer distance. Proof must next be offered showing that a shipment or shipments actually moved from A to B over this route, and that charges were collected on the basis of a rate which was higher than the contemporaneous rate on like traffic to the farther distant point over the same line in the same direction.

Necessity of Proving Movement to Farther Point. There is some conflict of opinion as to the necessity of proving that some one else made a shipment or shipments of like traffic to the farther distant point on which the charges were collected at the lower rate from A to C. The Act does not specifically require this.

Perhaps the sounder view is that a showing of shipments to the intermediate point at the higher rate is sufficient, on the theory that the Act prohibits the charging of a higher rate on shipments to the intermediate point than would have been charged if the same shipments had moved through to the farther distant point. Under this view the element of competition is not a necessary factor in establishing a violation of the long-and-short-haul pro-

vision of Section 4, although, in order to obtain reparation, the party who received shipments at the intermediate point B would have to establish the fact that he was in competition with a receiver of like traffic at point C. In order to avoid any question on the part of the Commission the complainant should show that shipments have been made to the farther distant point, if it is possible to make such a showing.

Authorized Departures. In placing the rates to B and C in evidence, the complainant should examine the tariffs very closely to ascertain whether they show express authority from the Commission for the maintance of the higher rate to the intermediate point. The Commission's rules require that when higher rates are in effect to intermediate points, the tariffs must show whether the carrier has an application on file asking for relief from the long-and-short-haul provision, or whether such relief has been granted. If the tariff shows that an application is on file with the Commission, the situation is "protected" and violation of the Act cannot be proved. If the tariff does not show authority for the situation or any application therefor, the shipper may assume that the rates are not "protected" and so testify.

Where the situation is protected by an application on file with the Commission it is a departure and not a violation. This distinction between Fourth Section departures and violations may be noted throughout Commission practice.

Aggregate-of-Intermediate-Rates Provision. The provision which authorizes the Commission to permit Fourth Section departures, upon application, is limited to cases where they "charge less for longer than for shorter distances." There is no express authorization to grant relief under the aggregate-of-intermediate rates provision, although for years the Commission assumed that it had such authority. More recently the Commission has side-

tracked all of the Fourth Section applications covering aggregate-of-intermediate rate situations, and has decided most of the cases involving the sum-of-intermediates, by holding that the rates assailed are unjust and unreasonable to the extent that they exceed the aggregate of intermediate rates.

Proof of Aggregate-of-Intermediates Violation. In proving a violation of the aggregate-of-intermediate rates provision, the complainant must show the rate to some intermediate point and the rate from that intermediate point to the final destination, with tariff references therefor. It is unnecessary to give any distances, any comparisons, or any evidence with respect to the transportation or traffic conditions. It is necessary only that the combination of rates be less than the through rate over the same line, in the same direction, on like traffic. It is not necessary to show competition, or that any local shipments have moved to or from the intermediate point upon which the combination is based.

It is not essential which intermediate point is made the basis of the combination rate. Any available combination may be cited and the Commission will recognize the "lowest available combination." It is not essential that the through rate be a joint rate. It is the total *charge*, under applicable through rates, which is made unlawful to the extent that it exceeds the charge which would be applicable under the lowest available combination.

Presumption of Unreasonableness Rebuttable. For many years the Commission held, consistently, that a through rate in violation of the aggregate-of-intermediate rates provision was unjust and unreasonable, and awarded reparation upon the basis of a mere showing of what the rates were and who was the real party in interest in making the shipments. Later, this absolute doctrine was dissolved into the present doctrine, which is that the existence of an aggregate-of-intermediate rates violation or

departure raises a presumption of fact that the charges under the through rate are unreasonable to that extent, but that this presumption is rebuttable.

In the *Lewiston Elevator Co. Case*,^① the shipper proved the violations, and the carrier rebutted the presumption of unreasonableness by showing the history of the rates and the manner in which they had become established, coupled with the fact that the Commission had prescribed the measure of the through rates. The Commission held that under the circumstances the presumption was rebutted, and found that the through rates, in excess of the combinations of contemporaneous intermediates, were not unreasonable.

That case, decided by Division 3 of the Commission, composed of three members, is unusual. A later case, the *Green Lumber Co. Case*,^② decided by the entire Commission on further consideration, held to the usual line of decisions and found that the evidence offered by the defendants failed to rebut the presumption of unreasonableness and that the rates were unreasonable to the extent that they exceeded the sum of the intermediates.^③

Where evidence is offered by the defendants to rebut the presumption of unreasonableness the shipper should be prepared, in case the defendants' proof is sufficiently convincing, to offer evidence in rebuttal, in an attempt to uphold the presumption of unreasonableness. The foundation for rebuttal evidence upon this point should rest upon the well-established rate-making principle that—

A through movement is less expensive than two local movements to and from an intermediate point.

Proof When Fourth Section Departures Are Authorized. When proof of a violation of the Fourth Section is offered and the defendants show that the departures are authorized by the Commission, the defense is complete under

^① 104 I. C. C. 473.

^② 109 I. C. C. 710.

^③ See also *American Shipbuilding Cases*, 102 I. C. C. 530.

this section unless the shipper can prove that the authority claimed by the carrier does not cover this particular rate situation. The complainants' traffic manager should check such a situation with great care.

If the case has been brought under sections 2, 3, and 4, or sections 3 and 4, the defense, under Section 4, that a departure is authorized is not also a defense under Section 2 or Section 3. In *Patterson v. L. & N. R. R. Co.*,^① decided October 12, 1925, the Supreme Court of the United States held that the grant by the Commission of relief from the provision of the Act prohibiting a greater through charge than the aggregate-of-the-intermediate rates, did not make lawful a rate which violated the provisions against unjust discrimination or rates unreasonably high. In the same case the Court held that shippers cannot recover for violations of that provision where an adequate and timely application by the carrier for relief remains undetermined.

Authority for Departure Must be Specific. Whenever, in defense of a Fourth Section case, a statement to the effect that the Commission has authorized the departures is introduced in evidence, the complainant should object to the evidence unless specific authority for the statement is proved in the proper manner. In this way it is possible to circumvent improper use of some old general Fourth Section order, which may lend itself to a number of interpretations.

Applications Awaiting Disposition. In cases where the carriers have filed applications with the Commission for relief from the provisions of the Fourth Section, and the applications which have not been acted upon are awaiting hearing, or have been heard but not acted upon, the shipper's position is even more difficult than where it is claimed that relief has been granted.

^① 269 U. S. 1.

In every such case, the shipper should develop from the carriers' witnesses the number of the Fourth Section application, the date filed, and the nature of the relief sought. It is possible that the Fourth Section application may antedate the time when the departure or violation first became effective, or it may be that the amount of the discrimination has been increased as a result of changes in rates. In other words, the difference between the rate to the intermediate point and the rate to the farther distant point may have been 20 cents when the application was filed, and subsequently this difference may have been increased to 40 cents, or some other amount.

If such a situation exists, the application does not cover the *increase in discrimination* and it is still possible for the shipper to maintain an allegation under Section 4. In such cases, or where the application is on file but not heard, the Commission usually assigns the Fourth Section application for hearing in connection with the formal complaint so that a complete disposition of the case and the application can be made. The Commission may change, from time to time, the nature and extent of the relief granted.^①

Restrictions on Commission's Power to Grant Relief. The power of the Commission to grant relief from the provisions of the Fourth Section is limited in several important respects. The Act, itself, imposes such restrictions in requiring that the rate to the farther distant point must be reasonably compensatory, that potential water competition shall not be regarded as justification for relief, and that certain conditions shall be observed in establishing rates at equidistant points on circuitous routes. These various limitations, which affect vitally the grounds of proof in Fourth Section cases, are given consideration in the following discussion.

^① U. S. v. Merc. & M. T. Assn., 242 U. S. 178.

Commission's Interpretation of "Reasonably Compensatory." In the *Trans-Continental Cases of 1922*,^① the Commission, after discussing the various theories and formulas, offered as proper interpretations and guides to be used in applying the term "reasonably compensatory," stated:

In the light of these and similar considerations, we are of the opinion and find that in the administration of the Fourth Section the words "reasonably compensatory" imply that a rate properly so described must:

- (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies;
- (2) be no lower than necessary to meet existing competition;
- (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and
- (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in Section 15a of the act.

It may be added that rates of this character ought, wherever possible, to bear some relation to the value of the commodity carried and the value of the services rendered in connection therewith.

The Commission laid down the further requirement that the carriers, in submitting proof in support of their applications for relief from the provisions of Section 4, should "affirmatively show that the rates proposed conform to the criteria indicated above."

Potential Water Competition. The amendments to the Fourth Section of the Act, added by the Transportation Act of 1920, showed the clear intent of Congress to make it the duty of the Commission to administer this section more effectively and actively than it had in the past. This intent is evidenced, not only by the removal of the discretion of the Commission with respect to the "reasonably compensatory" feature, but also with respect to the "potential water competition" and the "circuitry provi-

^① 74 I. C. C. 71.

sions." In *Trans-Continental Cases of 1922*, the Commission stated: "We think the amendment was the Congress's way of saying that we should follow a less liberal policy in dealing with departures from the long-and-short-haul rule than had been followed in former years."^①

The amended Act restricts the Commission's power to authorize relief from the provisions of the Fourth Section by directing that "no such authorization shall be granted on account of merely potential water competition not actually in existence." No discretion is left in the Commission, although, previous to the amendment, the Commission had, as a general policy, denied Fourth Section relief where the water competition was merely potential. Where a complaint alleges a violation of the Fourth Section and the carrier's defense is a Fourth Section application on file with the Commission, which is set for hearing with the formal complaint, if the relief sought is based upon water competition, the complainant should cross-examine thoroughly to determine whether the water competition is actually in existence or merely potential.

If there is no actual competition, the Commission cannot exercise discretion in the matter, but must deny the application. If the complainant has knowledge of the Fourth Section application, and knows that the only water competition upon which the application was originally based has been eliminated, he should request the Commission to set the application down for hearing with the formal complaint. Otherwise the Commission may overlook the application, and subsequently refuse to go into the Fourth Section question in its decision because the application has not yet been heard.^②

PROOF OF UNREASONABLENESS. Even if the complainant is able to show that the water competition is merely potential he should not rely upon the Fourth Section departure as proving the unreasonableness of the rate to

^① 74 I. C. C. 48, 70.

^② *Oklahoma Portland Cement Co. Case*, 96 I. C. C. 468, 470.

intermediate points. There is no presumption that the rate to the intermediate point is unreasonable.^①

INVESTIGATION AND SUSPENSION CASES. The burden of proof differs from the foregoing, however, in an Investigation and Suspension Case. If tariffs, which the defendants have filed and which the Commission has suspended, can be shown by the protestants to involve and create new Fourth Section violations, the Commission will not go into the merits of the proposed rates, but will order the suspended schedules cancelled on that ground alone.^② No showing of actual water competition, or any other kind of competition, affords relief in a situation of this kind. The theory of these cases is that the proposed rates would be unlawful under Section 4, and that therefore the Commission could not permit unlawful rates to become effective.

Circuitous Route Provision. The "circuit" or "equidistant" rule is expressed in absolute terms and leaves no ground for the exercise of discretion upon the part of the Commission where relief from the provisions of the Fourth Section is sought by the carriers upon the ground of circuity. The Commission so held and in a well-considered opinion in *Extension of Memphis-Southwestern Scale*,^③ and subsequently, in *Class and Commodity Rates Between Western Points*,^④ expressed this view in the following words:

The equidistant rule, though formerly observed by us as an administrative practice, is now an integral part of the law, and its application is mandatory where relief is sought because of circuity.

Shippers, therefore, have the right to prove their case under the circuity provision and demand that no higher rates be maintained between any two intermediate points than from and to the competitive points, where the dis-

^① *Wagner Motor Co. Case*, 93 I. C. C. 195, 196; and *Gentile Bros. Co. Case*, 93 I. C. C. 328, 329.
^② *Rice Products to Jackson Case*, 44 I. C. C. 364; and *Citrus Fruits Between Points in Florida*, 95 I. C. C. 532, 538.
^③ 62 I. C. C. 596, 614.
^④ 104 I. C. C. 595.

tance between the intermediate points is no greater than the distance from and to the competitive points.

In the *Southern Class Rate Investigation*,^① the Commission, in speaking of the circuity provision as the "equidistant" clause, said that relief would be granted on account of circuity subject to the equidistant clause, and to the further condition "that in establishing rates thereunder, the respondents will refrain from publishing the short-line rates over routes so circuitous as to result in wasteful transportation or in rates which to the more distant points are not reasonably compensatory."

As to the equidistant clause, in respect of group rate adjustments, the Commission said: "We have heretofore granted relief in some cases to permit group adjustments to be maintained. See *Alton Mercantile Co. Case*, 95 I.C.C. 645. Under the rate plan herein approved, it is doubtful whether such relief will in many cases be necessary, but in so far as it proves necessary applications therefor *may be* filed."^② This language seems to convey the idea that the Commission would like, in order not to break up existing groups of rates, to give relief without observing the circuity provision, but that it had grave doubts of its power to do so. Perhaps the waiving of the equidistant clause in the *Alton Mercantile Co. Case* was done as a matter of expediency rather than under strict legal interpretation.

DEGREE OF CIRCUITY. The conditions under which the Commission ordinarily grants relief to circuitous lines or routes may be summed up in a general statement that, ordinarily, relief will be denied:

1. Where the degree of circuity is less than 15 per cent.
2. For shorter hauls, where the degree of circuity exceeds 50 per cent.
3. For longer hauls, where the degree of circuity exceeds 70 per cent.

^① 100 I. C. C. 513, 708.

^② Italics are the author's.

These percentages are merely guide posts, and are by no means absolute. The degree of circuitry for which relief will be granted is now, as before, a question of fact for determination by the Commission in the exercise of its judgment.^①

Competition the Controlling Factor. In applications for relief under the provisions of Section 4 of the Act, the controlling factor is competition. This competition may be in one, or more than one, of several forms, such as water competition, rail-route competition, and motor-truck competition.

Perhaps the most striking instance of the effect of water competition upon rates in this country is the trans-continental adjustment under which rates from and to the Pacific coast, and to and from the eastern portion of the United States, were made lower than from and to intermediate points in intermountain territory.^② In general it suffices here to state that the relief sought should be such as to warrant the assumption that the proposed reduced rates will be low enough to attract to the rail lines some share of the water competitive traffic. Furthermore, the rates proposed under the relief sought, should not be so low as to:

1. Kill off the water lines.
2. Be less than reasonably compensatory.
3. Cast a burden upon other traffic.

Proof of Competition. In proving the foregoing general conditions the carriers should introduce statistics "showing the average revenue and average operating expense per ton-mile and per car-mile, average haul, and average car loading.^③ This evidence is necessary in support of the application, whether it is based upon water, or other kinds of competition. Where the relief sought

^① The following is a list of cases dealing with circuitry: 55 I. C. C. 648; 73 I. C. C. 228; 74 I. C. C. 496, 500; 74 I. C. C. 697; 77 I. C. C. 473, 526, 562; 102 I. C. C. 756 (70%); 104 I. C. C. 585, 592, 595; 109 I. C. C. 368, 374.

^② *Intermountain Rate Cases*, 234 U. S. 476, and *Transcontinental Cases of 1922*, 74 I. C. C. 48.

^③ *Class and Commodity Rates Between Western Points*, 104 I. C. C. 578, 584.

is based upon circuity the Commission usually asks or requires that the carriers show: that the short line rates conform to the Fourth Section; that there is no complaint pending as to the reasonableness of the rates of the long line at the intermediate point; and that the higher rates at intermediate points on the circuitous route appear on their face to be reasonable *per se* or to bear a reasonable relationship to the rate at the more distant point where rail competition obtains.

Instances of applications for relief on account of motor-truck competition will doubtless increase rapidly. One of the first instances where relief was granted upon this ground was in the *Railroad Commission of Louisiana Case*.^①

Market competition is ordinarily no justification for Fourth Section relief, although it is entitled to consideration.^②

Reparation Under Section 4. For many years doubt existed as to whether proof of an unprotected violation of the long-and-short-haul provision entitled the complainant to reparation, on the theory of unlawful exaction, upon mere proof that shipments had been charged a rate which was higher than the contemporaneous rate over the same line, in the same direction, to a farther distant point. In the *Eads Bros. Furniture Co. Case*,^③ and in the *National Hay and Milling Co. Case*,^④ the Commission found that—

In the absence of proof of actual pecuniary damages an unauthorized departure from the long-and-short-haul rule of the Fourth Section does not warrant an award of reparation.

This doctrine was upheld by the Supreme Court of the United States in the *Davis v. Parrington Case*.^⑤

^① 64 I. C. C. 197.

^② Fourth Section Applications Nos. 1870 et al., 24 I. C. C. 192.

^③ 102 I. C. C. 381, 383.

^④ 89 I. C. C. 1, 2.

^⑤ 264 U. S. 408; see also 281 Fed. 10.

The decisions of practically all of the courts in the land, including the State Supreme Courts of several states and the United States Circuit Courts of Appeals, had been unanimous in the opinion that an unauthorized Fourth Section violation entitled the shipper to reparation "as overcharges," upon the mere showing that he paid the charges to the intermediate point which were higher than if the shipment had moved on to the farther distant point. The Supreme Court of the United States overturned all of these decisions in the recent *Portland Seed Co. Case*.^①

The Commission has uniformly held, when a departure from the long-and-short-haul provision is protected by an application on file with that body, that no reparation will be awarded unless actual pecuniary damages are shown or unless the complaint and proof rest upon other grounds.

The doctrine in *Patterson v. L. & N. R. R. Co.*, cited on page 37, seems to go farther than the Commission's decisions and holds that a shipper cannot recover under any kind of proof under a violation of Section 4 where an adequate and timely application by the carrier for relief remains undetermined. In other words, there can be no reparation where the application is on file and undetermined, under Section 4. The complaint must rest on other grounds or reparation must be denied.

Unpublished Commodity Rates to Intermediate Points. When commodity rates are first published from and to specific points it frequently happens that there is no prospect of movement to hundreds, and in some instances, thousands of intermediate points. Rule 77 of the Commission's Tariff Circular 18-A contains a provision to cover situations of this kind in order to avoid the publication of unnecessary commodity rates from and to countless points of origin and destination. Rule 77 provides

^① The *Portland Seed Co. Case* was decided together with the *Davis v. Parrittton Case*, cited above, in 264 U. S. 403.

that the carriers may publish commodity rates from and to specific points, leaving higher class rates in effect from or to intermediate points, provided that they insert a clause in their tariffs to the effect that rates from or to intermediate points will be published on reasonable request of shippers wherever there is prospect of a movement.

RULE 77 PUBLICATION NOT A FOURTH SECTION APPLICATION. Were it not for Rule 77 the rates to the intermediate points would be in violation of the long-and-short-haul provision of Section 4 of the Act, and the Commission could not allow the tariffs to go into effect. For this reason, the insertion of the Rule 77 provision in the tariff is said by the Commission to be a "sufficient compliance with the Fourth Section" so far as the filing of the tariff is concerned. However, this does not mean that the Rule 77 provision is the same as a Fourth Section application, and it does not mean that relief from the Fourth Section is granted by the mere publication of the Rule 77 provision in the tariff. On the contrary, it means that the shipper who happens to make a shipment from or to an intermediate point may be as favorably situated, due to the Rule 77 provision, as if the commodity rate had actually been made applicable from and to intermediate points when it was established.

COMMISSION'S APPLICATION OF RULE 77. This doctrine with reference to Rule 77 is borne out by the Commission's decisions affecting reparation claims on shipments made to intermediate points. The Rule has often been misunderstood and misquoted. Therefore it had best be exemplified by several illustrations from the Commission's decisions.

In *Missouri River Building Stone Rates Case*,^① the respondents had in effect commodity rates on stone from Sandstone, Minn., to Omaha, Nebr., and from and to other points. These rates were not made applicable from

and to all intermediate points, but the tariff, by a Rule 77 provision, provided that upon reasonable request therefor rates no higher would be established on short notice from any intermediate point. Request was made for such rates to intermediate points, and the carriers, instead of establishing the same rates from intermediate points, attempted to cancel the rates from Sandstone. The Commission suspended and ordered cancelled the proposed increased rates to farther distant points, saying:

Rule 77 was adopted solely as a feasible and economical plan under which commodity rates might be published from known points of production to known points of consumption without also publishing commodity rates from or to all intermediate points, which perhaps, or even probably, would never forward or receive shipments of that commodity. . . .

The use of this rule does not deprive the intermediate points of any of their lawful rights, and its incorporation in a tariff is a recognition of the rights of the intermediate points under the long-and-short-haul rule and a *published guaranty*^① that those rights will be recognized and protected upon demand.

In the *Kosse, Shoe, & Schleyer Co. Case*,^② the Commission awarded reparation on the basis of the rate to the farther distant point on shipments made from an intermediate point, where the tariff carried the Rule 77 provision. The Commission found that the evidence did not justify any departure from the Fourth Section of the Act, and held that the rate was *prima facie* unreasonable to the extent that it exceeded the rate from the farther distant point.

This case has been consistently followed in many subsequent cases, and reparation has been uniformly awarded on shipments from or to intermediate points where the Rule 77 provision was incorporated in the tariffs. The measure of the damages in such cases, unlike other cases involving long-and-short-haul departures or violations, is not "pecuniary" or "actual damages," but

^① The italics are the author's.
^② 41 I. C. C. 602.

arises, as in violations of Section 1 of the Act, by mere payment of the excessive charges.^①

PRIOR REQUEST FOR ESTABLISHMENT OF RATE UNNECESSARY. These holdings of the Commission apply even where no request for the establishment of the rate from or to intermediate points under Rule 77 was made prior to the movement. In the *Armour & Co. Case*,^② the request was made prior to the movement and the rate was established subsequent to the movement. Reparation was awarded on the ground of unreasonableness, upon a mere showing that the tariff was subject to the Rule 77 provision. In the *Pacific Grain Co. Case*,^③ the Commission, citing various cases, held that a request for publication of the rate to the intermediate point prior to the movement of the shipments is not essential in order that the shipper may take advantage of such provision.^④

PRACTICAL APPLICATION

Problem. The Smith Cooperage Co. of Kansas City, Kans., ships slack wooden barrels to Tulsa, Okla. The rate charged is a commodity rate of 45.5 cents per 100 pounds, carload minimum 20,000 pounds making the revenue per car \$91.00. However, from Kansas City to Havana, Kans., the rate on this commodity is 21 cents, carload minimum 14,000 pounds, making the charge per car \$29.40, while from Havana to Tulsa the rate is 43.5 cents, carload minimum 10,000 pounds, making the charge per car \$43.50. What provision of the Act is violated in this case?

Solution. The carload charge of \$91.00 exceeds the charge of \$72.90 based on the sum of intermediate rates to and from Havana, Kans. This situation is in violation of the aggregate-of-intermediate rates provision of Section 4 of the Act.^⑤

^① *Gamble Robinson Fruit Co. Case*, 50 I. C. C. 301; *Carey Co. Case*, 96 I. C. C. 455, 456, 457.

^② 80 I. C. C. 210.

^③ 85 I. C. C. 710, 711.

^④ *Producers Refining Co. Case*, 69 I. C. C. 403; the *Standard Asphalt & Refining Co. Case*, 66 I. C. C. 611; and the *Pittsburgh Crucible Steel Co. Case*, 81 I. C. C. 659.

^⑤ 115 I. C. C. 535.

Chapter V

PROOF OF VIOLATION OF SECTION 6 AND SECTION 13

THE provisions of Section 6 of the Interstate Commerce Act, relating to the publishing and charging of rates, and those of Section 13, dealing with the relationship between intrastate and interstate rates, give rise to important types of cases, the grounds of proof in which are different from those complaining violations of the first four sections of the Act. The nature of the issues involved, and the kind of evidence required in proving violations of Section 6 and Section 13, are explained and illustrated in the following discussion.

Proof of Violation of Section 6 of the Act. In rate cases the term "Section 6" is used to denote the provisions of the Act which require the carriers to file, print, and keep open to public inspection, their schedules or tariffs of rates, fares, and charges for all services which they render to shippers. Section 6 also includes those provisions which require the carriers to make no changes in rates without thirty days' notice, unless authorized by the Commission, and to observe the published rates, without any deviation or departure therefrom. Paragraph 13 (a) to (d) inclusive, of Section 6, is commonly referred to as the Panama Canal Act, as though it were not a part of Section 6.

The discussion in this manual does not deal with the Commission's jurisdiction over rail and water carriage, physical connections between the two, terms of construction of such connections, establishment of through routes and joint rates thereover, and proportional rates, as defined in the Panama Canal Act, but is confined to the

usual questions which arise in making proof of those violations of the section which involve the legality of the rates charged and the rates published.

Proof of Rate Legally Applicable. The primary requisites in proving an allegation that the charges collected were "illegal" in violation of Section 6, are the presentation of freight bills showing the points of origin and destination, the weights, and the charges paid, together with the rate upon which the charges were based. Secondly, the rate which the complainant alleges was "legally" applicable should be proved by giving specific reference to the tariff number, issuing line or agent, effective date, and page or index number, under which it may be located.

TARIFF REFERENCE IS SUFFICIENT. Under amended Rule-XIII of the Commission's Rules of Practice it is not necessary to offer a copy of the tariff in question in evidence. Proper tariff reference is sufficient to put the parties on notice of the rates and provisions contained in the issue and the Commission takes judicial notice of all tariffs on file with it, when proper reference to them is made. However, in cases where certain lengthy rules and provisions in a number of tariffs are involved, as, for example, transit rules, it is best to produce copies of the tariffs in evidence, so that the presiding examiner or commissioner, may study the tariff wording as the evidence is being introduced.

Strictly speaking, after the tariff is properly in evidence by reference, the case rests upon judicial construction of the language of the tariff, and this is a matter of argument, upon brief or oral pleading, before the Commission or the examiner. Where there is a patent or a latent ambiguity, it frequently becomes necessary or permissible, to let experienced traffic men give their expert opinions upon the meaning and intention of the tariff language. In other cases, it is necessary and permissible

to have a witness, who actually saw and handled the shipment, testify as to the actual nature of the article which was shipped.

Use of Tariffs. In proof of the illegality or nonapplication of certain rates or charges, the tariff is the best evidence and speaks for itself, provided that its nonapplication can be shown. In this connection it is also well to prove, if this is possible, the tariff and rate applicable in its place.

CHARGES MUST BE PUBLISHED. In some cases a search of the tariffs discloses not only that the rate charged was not applicable but also that there was no tariff rate applicable. Section 6 of the Act provides that the carrier shall not engage in transportation until it has published its charges, and there is a penalty accruing to the Government when a carrier performs transportation without having a rate to cover it on file with the Commission. However, the shipper is ordinarily not as concerned with criminal prosecutions as he is with the recovery of private damages resulting from the public wrong. In a number of cases of this kind, the Commission has construed its administrative duty as requiring it to determine whether the illegal and unauthorized charges were unreasonable and what would have been reasonable charges for the shipment in the absence of any legal rate.^①

If the shipper proves that the rate charged was not applicable, that is, that it was in violation of Section 6, there is no burden upon him to show what rate was applicable. The law does not require proof of a negative. The shipper does not have to prove that another, or no rate was published on the article in question.

PUBLISHED TARIFF MUST BE OBSERVED. The tariffs, when published, must be strictly observed.^②

^① *Memphis Freight Bureau Case*, 17 I. C. C. 90; *Zelnicker Supply Co. Case*, 52 I. C. C. 548.

^② *Armour Packing Co.*, 209 U. S. 56; *Texas & Pacific R. R. Co. v. Cisco Oil Mill*, 204 U. S. 449; *Blinn Lumber Co. Case*, 18 I. C. C. 430; *L. & N. R. R. Co. v. Maxwell*, 237 U. S. 94.

Tariffs, being published and filed as required by the Act, have the same effect as statutes, so far as judicial and administrative construction is concerned and the court rules for legal interpretation of words and phrases must be applied.

Tariffs, like statutes, must be construed strictly and against the framer who is charged with the duty of printing tariffs in plain and simplified form. A shipper has the right to rely upon the obvious meaning of the tariff and cannot be expected to resort to the intention of the framer to ascertain the obvious meaning.^②

RATE IN EFFECT UNTIL CANCELED. A rate, when published, remains in effect until canceled. Where two carriers participate in the publication of a rate, one carrier cannot change the rate or a part thereof by its own act. Any attempt to do so would leave the old rate in effect. Ordinarily when one rate has been published and a second rate, which is different, is published, the earlier of the two is regarded as the published rate until canceled. However, where two rates are in effect the Commission ordinarily gives the shipper the benefit of the lower.

COMBINATION RULE CASES. A class of cases involving allegations under Section 6, which occurs frequently in Commission practice, is described in detail in the following paragraphs, in order that the facts in one such typical Section 6 case may illustrate some of the fundamental principles of this section.

The "Sligo" principle cases usually involve a construction of the "Jones combination rule." In general, such a rule provides, in substance, that where no joint rates are in effect the through charges will be made by first deducting a specific amount, such as 1.5 cents on sand and gravel, from each of the separate factors making up the combination rate, and then adding this amount, just once, to the sum of the factors so treated. Difficulty arose

^② *Newton Gum Co. Case*, 16 I. C. C. 341.

by reason of the fact that in connection with some combination rates, the Jones combination rule was published in one factor and not in the other factor of the through rates.

The Commission, in a number of cases, held that the combination rule was applicable, even where it was specifically provided for in only one of the tariffs naming a factor of the combination. The Commission also found that the carrier which published the Jones combination rule in its tariff was responsible therefor, and would have to protect the shipper in so far as the other carrier was concerned.^①

Use of Classifications. The principal difficulties encountered in making use of classifications in Section 6 cases are with the descriptions. Some are broad, some are specific. The Commission has construed questions which involve general or particular ratings rather liberally in favor of the shipper and has seemed to lean toward giving the shipper the lower of the two ratings. Legal construction requires that specific ratings take precedence over general ratings, but apparently the Commission has not always followed this principle.

Difficulty has also been experienced with some of the general rules of the classifications, such as the rule for parts or pieces constituting complete articles. Just what parts constitute a completed article is often in serious doubt and involves a question of fact as well as of how the language should be construed.

Use of Tariff Circular. The use of Tariff Circular 18-A is strictly legal in Section 6 cases. In this section, Congress has authorized the Commission to prescribe the form of the publication of rates, and to reject the tariffs offered for its inspection when the effective date is not shown. In the same section, Congress has fixed a pen-

^① *United States Gypsum Co. Case*, 123 I. C. C. 200; *Sligo Iron Store Co. Case*, 62 I. C. C. 643, 73 I. C. C. 551; *Armour Fertilizer Works Case*, 93 I. C. C. 186; and *Standard Oil Co. Case*, 81 I. C. C. 193.

alty on the carriers for failure to comply with the Commission's rules for filing tariffs.

In cases involving Rule 77, Rule 5-B, and Rule 71 of the Tariff Circular, for example, the Commission's tariff circular may become not only admissible evidence, but the best evidence and that upon which the whole case may turn. Judicial notice of Tariff Circular 18-A must be taken not only by the Commission, but also by the courts, because it is framed in accordance with specific authority under the Act and is within the administrative powers of the Commission.

Use of Conference Rulings. The use of the Commission's Conference Rulings stands upon a less secure foundation. While these rulings are based upon specific facts, these facts are usually presented in an *ex parte* manner. There is no specific authority in the Act itself, for these rulings, which at best are merely informal administrative expressions of the Commission. They may be employed in cases where there has been no other administrative or judicial construction by the Commission or the courts, and in this capacity serve a useful purpose.

Use of Commission Decisions. The use of decisions of the Commission is frequently resorted to in cases requiring legal interpretation of tariffs, and in this respect, the doctrine of *stare decisis*[®] is usually applied by the Commission, even if not by the courts. When a Section 6 case is brought in the courts, either originally, or on an order of the Commission, the courts may or may not follow decisions of the Commission. They will consider them, but they are not bound by them. Ordinarily the courts regard the Commission's decisions on questions regarding the "legality" of charges as in the nature of administrative findings by an expert body. In doing so they are inclined to give great weight to the Commission's

[®] To stand by decided cases; to uphold precedents; to maintain former adjudications. *Black's Law Dictionary.*

views, especially where the tariffs under consideration are extremely involved and complicated.

Measure of Recovery. The only proof necessary in support of a claim for reparation under Section 6 is that the claimant is the real party in interest, that he paid, and/or bore the transportation charges as such, and was a party to the transportation record. He must also prove what the amount of charges should have been if the legal rate had been charged. The measure of the damages is the difference in the charges, and no actual damages need be proved. Violations of Section 6 are designated as straight overcharges and there is no necessity for an order where the carrier is willing to make refund. The Commission usually enters an order in Section 6 cases only where the carriers take a different view and are unwilling to accede to the Commission's view.

Special limitations upon the time within which claims for overcharges can be filed, are prescribed by Congress in paragraph 3 (c) of Section 16, of the Act. Actions at law and complaints before the Commission for straight overcharges under Section 6 of the Act, must be filed within three years from the time the cause of action accrues. The Act further provides that where the claim for overcharges has been presented in writing to the carrier within the three-year limitation period, the period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim.

Unlike claims for reparation brought under sections 1, 2, 3, and 4 of the Act, in which the Interstate Commerce Commission has exclusive original jurisdiction, claims under Section 6 may be brought *ab initio*^① before either the courts or the Commission. An order of the Commission is not a necessary precedent in court to suit in a Section 6 case, alleging that the charges are illegal.

^① *Ab initio* means "from the beginning."

Proof of Violation Under Section 13. A Section 13 rate case is one which brings in question the rates from and to interstate points, on the one hand, and the rates on like traffic from and to points wholly within one state, on the other hand. These cases involve only the question of "relationship" of rates, and to this extent are similar to cases brought under Section 3 of the Act, alleging undue prejudice. They differ from Section 3 cases in that the Commission's power to remove undue prejudice under Section 3, where that is the sole issue in the case, is limited to *alternative* orders, whereas in Section 13 cases, the Commission's authority goes farther and enables it to prescribe the exact method of removing the undue prejudice or discrimination.

It therefore follows that the proof in Section 13 cases should go into the measure of the intrastate rates as well as the measure of the interstate rates, and the complainant should make his proof conform to the prayers for relief. The complainant should attempt, in his proof, to show that—

1. The interstate rates are unreasonably high.
2. The intrastate rates are less than maximum reasonable rates.
3. The "relationship" is unduly prejudicial.

The form of proof adopted depends upon the relief sought by the complainant. In other respects the proof should conform to that in Section 3 cases of undue prejudice or preference.

Proof of How Rate Was Established. One important element which the complainant should attempt to prove in a Section 13 case, which does not exist in any other class of rate cases, is whether the intrastate rate was prescribed by the State Commission or the State legislature, or was voluntarily established by the carriers.

Provisions of Section 13. In paragraph 1, Section 13 of the Act provides for the filing of complaints with the Interstate Commerce Commission, by individuals,

firms, organizations, municipalities, or common carriers, and in paragraph 2, for the filing of complaints by the railroad commissioner or commission of any state or territory. In paragraph 3 provision is made for procedure in interstate cases where intrastate rates are involved or may be affected, for conferences and co-operation between the Interstate Commerce Commission and the various state Commissions for joint hearings of the Interstate Commerce Commission with the various State Commissions "on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission," and for use, by the Commission, of the records and facilities of the State authorities.

Prejudice between Interstate and Intrastate Commerce. Paragraph 4 of Section 13 is the one under which the usual rate cases are brought where undue prejudice between interstate and intrastate commerce is alleged. This paragraph contains two distinct provisions, the first of which directs the removal of any undue or unreasonable advantage, preference *or* prejudice as *between* persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. In connection with rates, the word *between*, has been construed to mean in both directions. It is clear that the Congress had in mind the removal of preference of intrastate commerce or prejudice to intrastate commerce, as well as preference of interstate commerce or prejudice to interstate commerce. Any other construction would ignore the common and accepted use of the word "between" and would ignore the use of the word "or."

The second distinct provision in this paragraph is the prohibition concerning any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. This second provision is for two purposes, first, to make clear that interstate and foreign commerce were to be protected in any event, and second, to make clear

that the first provision was made for the protection of intrastate commerce against interstate commerce, as well as for the protection of interstate commerce against intrastate commerce. If the first provision were intended only for the protection of interstate commerce against unjust discriminations in favor of intrastate commerce, then the second provision would have been unnecessary.

In support of the construction of the language of the Act offered above, attention is directed to the fact that the provision was enacted at a time when the Commission, due to Federal control and the ensuing guaranty period, had the power to control most intrastate rates, and situations were inevitable where it would be necessary for the Commission to remove discriminations against intrastate commerce. Unless this provision had been worded as it was nobody would have had authority to remove such discriminations.^①

In the *Mathieson Alkali Works Case*,^② the Commission passed upon the allegation that the rates were unduly prejudicial to intrastate commerce and gave preference to interstate commerce in violation of Section 13 of the Act. The proof in such cases would be no different from that in an ordinary Section 3 case, except that the shipper might be able to prove that the intrastate rate should be reduced to the level of the interstate rate in order to remove the undue preference of interstate commerce. If the interstate rate were one prescribed by the Interstate Commerce Commission and the higher rate were in effect due to an act of a state legislature, for example, the shipper should offer proof, as in Section 1 cases, to show that the intrastate rate was unreasonable.

The Shreveport Case. For several years prior to the enactment of paragraph 4 of Section 13, the Commission had exercised its power to remove undue prejudice

^① In a recent decision the Commission has held to the contrary; viz., that it has no power to remove prejudice against intrastate commerce. *Mutual Creamery Co. Case*, 182 I. C. C. 207.

^② 77 I. C. C. 150, 152.

against interstate commerce in favor of intrastate commerce, in cases brought under Section 3 of the Act. The Supreme Court of the United States upheld the Commission in its interpretation of Section 3 in the celebrated "*Shreveport*" Case.^①

There is this distinction between so-called *Shreveport* cases and cases brought under Section 13, paragraph 4 of the Act. In the former, the Commission found that the interstate rates were not unreasonable but that they were unduly prejudicial to interstate commerce and unduly preferential of intrastate commerce. An alternative order was issued, and the carriers complied therewith by raising the Texas intrastate rates, in disregard of the Texas authority over the intrastate rates. The raising of the intrastate rates was the indirect result of the Interstate Commerce Commission's order. Under Section 13, this power of the Commission was made statutory by Congress, but was carried a step further. Under paragraph 4 of this Section, the Commission would have had *direct* authority in the *Shreveport Case* to prescribe the manner in which the discrimination or preference should be removed. The Interstate Commerce Commission could have issued, not an alternative order which the carriers could use as authority for increasing the intrastate rates, but a direct order requiring the carriers to raise the intrastate rates; or, if the interstate rates had been found unreasonable, the Commission could have required increases in the state rates and reductions in the interstate rates to a common level.

Horizontal Changes in Intrastate Rates. In cases of broad magnitude involving horizontal increases in all rates in a large region, or throughout the United States generally, under Section 13, paragraph 3, the carriers are authorized to petition the Commission with respect to rates, fares, charges, classifications, regulations, and prac-

^① *Houston & Texas Ry. v. United States*, 234 U. S. 342. See also *R. R. Com. v. La. Case*, 48 I. C. C. 359.

tices made or imposed by authority of any State. Under Section 13, the Commission has the authority to authorize horizontal increases in state rates, the same as, under the provisions of Section 15a of the Act, it may authorize increases in interstate rates. This power is not dependent upon a minute survey of the particular rate structure in each and every state, but rests upon the broad general grounds that a horizontal increase on interstate traffic and not on intrastate traffic in the same region would result in undue prejudice to interstate traffic within the meaning of Section 13, paragraph 4.^①

In general increase and reduction cases of this character, in order to establish a violation of Section 13, or undue preference of intrastate commerce in cases of increases in interstate rates, or undue preference of interstate commerce in cases of reductions in interstate rates and not in intrastate rates, the proof rests almost entirely upon logic and argument. Illustrations of the resulting preferences and prejudices alone should be sufficient, without any detailed analysis of the different rate structures.

PRACTICAL APPLICATION

Problem. Subsequent to January 1, 1910, and for some time prior thereto, the rates applicable on fresh or frozen fish from Boston to New York have been third class in carloads, minimum 24,000 pounds, and first class in less-than-carloads. By exceptions to the classification, the rates on "bait, fish, in packages, such as shucked clams, fish, etc., used for bait," have been fifth class, in carloads, minimum 24,000 pounds. The tariffs did not name the fish entitled to the fish bait rates, but at conferences between representatives of the carrier and shipper, it was verbally agreed that sardines, squid, cockerel, whiting, sand eels, and tusk mackerels, if offered as fish bait, would be transported at the fish-bait rates. This agreement was reached after the carrier had been advised by an authority on fish that the kind named were generally sold or used for bait. It later came to the attention of the carrier that tusk mackerels were being used for food, and shippers were notified, in August, 1924, that these fish could

^① *Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co.*, 257 U. S. 563, and various other similar cases arising out of the general increase of 1920.

no longer be shipped as bait. The shipper alleges violation of Section 6 of the Act, based on the fact that since August 25, 1925, fish formerly shipped as bait, were charged the rate on fresh or frozen fish. However, evidence shows that all shipments of fish made by complainant since that time consisted of fresh and frozen fish, and were tendered to the carrier as such. In view of the agreement between the carrier and shipper and the practice of carrier in accepting shipments as fish bait and assessing charges as such, do you consider that Section 6 of the Act was violated on the later shipments which were charged the higher rate?

Solution. The verbal agreement under which certain named fish were accepted for transportation as fish bait, has no legal weight in determining the applicable rate on shipments of those fish, as this agreement was not published in tariffs on file with the Commission. Furthermore, the later shipments were tendered to the carrier as fresh and frozen fish, and the higher rate charged is the legally applicable rate on such shipments. Consequently there is no violation of Section 6 of the Act.

Chapter VI

PROOF OF VIOLATION OF SECTION 15

SECTIONS 15 and 15a of the Act contain the great body of adjective law^① under which the Interstate Commerce Commission functions. In addition, these sections contain a number of substantive, remedial provisions which, for logical arrangement, might well be in separate or other sections of the Act.

Purpose of Section 15. The following summary of some of the principal paragraphs of Section 15 indicates the purpose of this section:

1. Paragraph 1 empowers the Commission to fix maximum and/or minimum rates, or precise rates.
2. Paragraph 2 provides that the Commission's orders shall run indefinitely, until changed by the Commission.
3. Paragraph 3 conveys the power to prescribe through routes and joint rates, and likewise divisions and operating conditions thereover, whether the routes are all-rail or rail-and-water.
4. Paragraph 4 limits the power granted in Paragraph 3 to the end that the carriers shall not be required to short-haul themselves. Paragraph 4 also provides for the establishment by the Commission of routes in times of emergency.
5. Paragraph 5 prohibits extra charges for loading and unloading livestock at public stockyards, and authorizes the Commission to prescribe rules therefor.
6. Paragraph 6 empowers the Commission to prescribe the divisions of joint rates, and to make such divisions retroactive, laying down certain directions for consideration by the Commission in such cases.

^① By adjective law is meant the rules according to which the substantive law is administered. The substantive law is that part of the law which creates, defines, and regulates rights, whereas the adjective or remedial law prescribes the method of enforcing rights.

7. Paragraph 7, as amended in March, 1927, provides for the investigation and suspension of proposed changes in rates, fares, and charges, during a seven months' period; Paragraph 7 also fixes the burden of proof upon the carriers as to rates or charges increased since January 1, 1910.
8. Paragraph 8 confers upon the shipper the right to route his shipments.
9. Paragraph 11 prohibits the giving of private business information gained from transportation records.
10. Paragraph 13 confers on the shipper the right to receive allowances for facilities of transportation furnished the carriers, and empowers the Commission to fix reasonable allowances therefor.

Purpose of Section 15a. The purpose of Section 15a is, in the main, to place the fortunes of the carriers as a whole within the jurisdiction of the Commission in order that they may be permitted to earn a fair rate of return upon the carrier property devoted to public use. The Commission is empowered to fix the fair rate or rates of return based upon the aggregate value of the carrier property, and to recapture from the carriers one-half of the income earned in excess of 6 per cent per annum, the other half of the excess to be held by the carrier in a reserve fund.

The Commission is also empowered to administer the general railroad contingent fund, and to make loans to carriers in need. The Commission may lease equipment purchased from the contingent fund. The provisions of Section 15a are, in most part, administered by the Commission through its Bureau of Finance. However, as a detailed study of finance cases is not contemplated here, further discussion of these provisions is unnecessary.

In cases brought under Section 15a, involving increases or decreases in all rates throughout major regions, or throughout the entire country, the character of proof is entirely different from that which is employed with respect to particular rates on particular kinds of traffic from designated points or groups of origin, to cer-

tain designated destination points or groups. The evidence in Section 15a cases consists principally of financial and transportation statistics of the carriers, and the underlying basis of all of this class of evidence is the annual reports of carriers to the Interstate Commerce Commission.

Unreasonableness Under Section 15 Compared with Section 1. In Section 1, the Act provides that all rates, fares, charges, and practices shall be "just and reasonable" and leaves the determination of what is "just and reasonable" within the flexible limit of the Commission's judgment. In Section 15 the Commission is empowered "to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such cases, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable," In other words, Section 15 imparts the power to prescribe maximum and/or minimum rates, fares, and charges.

Minimum Rate Power. While the power to prescribe minimum rates is comparatively new, the Commission has, in a number of cases, discussed the general principles of minimum rate making and the kind of proof which should be considered in cases where this power is invoked. In the *Salt Cases of 1923*^①, the Commission, citing the *Sugar Cases of 1922*,^② stated that the minimum rate power should be sparingly exercised, and only in cases where it clearly appears that its exercise is necessary in order that substantial public injury may be avoided.

With respect to proof in minimum rate cases the Commission said, in the *Salt Cases of 1923*.^③

^① 92 I. C. C. 388, 411.

^② 81 I. C. C. 448.

^③ 92 I. C. C. 388, 410.

The act prescribes no different tests or standards for the determination of just and reasonable minimum rates than for just and reasonable maximum rates. And there is nothing in the act which either directs or implies that we should use tests of different general character in the determination of reasonable minimum rates than those which we have consistently and uniformly applied for many years, with the tacit consent and sanction of the Congress and the express approval of the courts, in fixing maximum reasonable rates we have always given special consideration to comparisons of going rates on the same commodity in the same or similar territories, in relation to distances, revenue per car, car-mile, and ton-mile, variations in traffic density, and peculiarities, in transportation which affect transportation costs in general. No practical reasons are advanced why these same standards should not be applied in the fixing of minimum reasonable rates.

Minimum rates were fixed in the *Salt Cases of 1923*, and the Louisiana shippers of salt assailed the Commission's order in the Federal courts. The Court sustained the Commission's decision and quoted from it at length. In *United States v. Illinois Central R.R. Co.*,^① the Supreme Court of the United States said:

. . . . and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable.

One of the principal grounds for the exercise of the minimum rate power in the *Salt Cases of 1923* was to stop the series of rate wars between carriers serving different competing fields. Some of the complainants alleged that the rates from competing fields were unreasonably low, and asked some of the carriers to save them from this form of ruinous competition. Another theory upon which the minimum rate power is invoked is that the competitive rates have become so low as to cast a burden upon other traffic. Proof of this fact must necessarily be rather vague and indefinite and must rest upon argument and assumption rather than upon mathematical demonstration.

① 263 U. S. 515.

Investigation and Suspension Cases. The character of proof in "I & S." cases is not different from that in complaint and answer cases, but the extent and order of the evidence is often different. In a complaint case the complainant must introduce his evidence first. In an I. & S. case the order of procedure is reversed, regardless of the question of burden of proof. But, in an I. & S. case, if the carriers proposing the changes in rates, charges, or regulations, offer no testimony, no evidence is necessary on the part of the protestants. The hearing is closed, and an order is entered without a report requiring the cancellation of the suspended schedules.

Burden of Proof. Section 15 provides that the burden of proof shall be upon the carrier to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, at any hearing involving a rate, fare, or charge increased since January 1, 1910, is just and reasonable. The form of proof to employ in such cases is discussed at length in the preceding manual.^①

Proof in Other Cases Under Section 15. The proof in other cases under Section 15 is varied to meet the special conditions. The following paragraphs contain a brief discussion of the essential points or grounds of proof for cases relative to:

1. Establishment of through routes and joint rates.
2. Establishment of divisions of joint rates.
3. Short-hauling the carrier.
4. Routing of freight by Commission.
5. Routing of freight by shippers.

Establishment of Through Routes and Joint Rates. Paragraph 4 of Section 1 of the Act makes it the duty of common carriers subject to the Act to "establish through routes and just and reasonable rates" therefor, to pro-

^① GROUNDS OF PROOF UNDERR SECTION 1 OF THE ACT—FACTORS IN UNREASONABLENESS.

vide reasonable facilities for the operation of the through routes, and to establish reasonable and equitable divisions between the carriers participating in the joint rates.

Section 6, paragraph 13, provides additional jurisdiction of the Commission over rail and water traffic, including the power to establish physical connections between rail and water lines; to establish through routes and joint rates and the terms and conditions thereof; to establish proportional rates applicable on traffic brought to or taken from the port by a common carrier by water; and to require rail lines already operating in connection with any water carrier to make similar arrangements with other steamship lines.

Section 15, paragraph 3, empowers the Commission to establish through routes and joint rates, either maximum or minimum rates, or both, except that with respect to rail-and-water traffic, the power is limited to maximum reasonable rates. The limitations upon this power are that no street electric railway, not engaged in general freight business, shall be included in such through routes without its consent; that the power shall not extend to routes of transportation wholly by water; and that no carrier shall be required to "short-haul" itself, except where the route would otherwise be unduly circuitous.

Meaning of Through Route. Generally speaking the carriers have done their utmost to provide through routes of travel and transportation by railroad throughout the United States and they have been so successful that the Commission is seldom called upon to exercise the power of establishing through rail rates. In explanation of a through-rail route, we may say that this ordinarily means that physical connections exist between the rail lines so that freight can be transported from points on one line to points on other lines on through bills of lading, without the necessity of taking delivery and making reshipment in any manner at the junction or junctions between connecting lines.

A through route has no necessary connection with a joint rate. The rates applicable over through routes may be local, joint, proportional, or combination. The question of the "throughness" of the route relates to the carriage of the goods, and not to the form of the rates. The carriage must be continuous, by arrangement between the carriers, as a matter of physical handling.

Proving That Through Routes Should Be Established. The proof necessary to warrant the establishment of a through route, whether all rail or rail and water, should show that:^①

The necessary carriers are made parties defendant to the petition.

The necessary carriers are engaged in the transportation of general freight or passengers or both, in interstate commerce.

The defendants have the necessary facilities for the continuous carriage of freight from and to the points desired to be included, or

The establishment of the route would require certain facilities.

The several carriers are financially responsible, one to the other, and in a position to assume the financial obligations incident to the through carriage of freight or passengers or both.

The service desired is necessary or desirable in the public interest. (Note that this does not require a showing of absolute necessity.)

If any existing routes are open, the existing routes cannot promptly or efficiently handle the tonnage that is being offered or available.

If there are no existing routes, there will be sufficient tonnage available to warrant the expense of establishing physical connections or such other facilities as the facts may require.

^① The following list of important cases indicates the nature of the evidence discussed in each:

Public interest—*Western Coal Rates*, 80 I. C. C. 383, 415, 434.

Section 15 takes precedence over Section 1, paragraph 4—*Tidewater Paper Mills Case*, 80 I. C. C. 493, 497.

What constitutes a through route—21 I. C. C. 515; 29 I. C. C. 464, 671, 674.

Parallel competing lines—*St. Louis Electric Terminal Ry. Co.*, 55 I. C. C. 52.

Present service adequate—*Decatur Navigation Co. Case*, 31 I. C. C. 281, 285.

General tests used in considering applications for through routes—*Ocean-and-rail Rates to Charlotte, N. C.*, 38 I. C. C. 405, *Coal from Sewell Valley R. R. Stations*, 58 I. C. C. 261; *Western Coal Rates*, 80 I. C. C. 383, 434; *Spokane & Eastern Ry. Case*, 109 I. C. C. 713, 716, *Cancellation of Rates and Routes via Mississippi Central*, 100 I. C. C. 71.

There are no parallel routes, or if so, that the parallel routes are inadequate.

If there are competing routes, the establishment of the desired route will not cause such loss of tonnage to the existing line as to impoverish that line or impair its financial ability to continue operations.

Establishment of Divisions of Joint Rates. Ordinarily the divisions of joint rates concern the carriers only and do not affect the shipper, whose interest centers in the measure of the joint rates.

When Divisions May Have Evidentiary Value. Ordinarily divisions are not accepted in evidence as bearing upon the measure of rates. However, in a very few cases the divisions do have some evidentiary value in considering the measure of the rates. In very late cases the Commission has been disinclined to rule out testimony bearing upon divisions where the measure of the rates alone was in issue. A brief sketch is helpful in understanding the classes of cases in which evidence of the divisions may be not only admissible, but of some probative weight.

Suppose, for example, that the carriers in Southern Territory were accepting for the haul south of the Ohio River, as their share of joint rates from Madison, Wis., to points in Southeastern Territory, divisions which were only one-half of the divisions on like traffic from Omaha, Nebr., moving through the same gateways. Such evidence would be entitled to some weight upon an issue of undue prejudice against Omaha and in favor of Madison, and might have some bearing upon the measure of the rates from Omaha.

Again, suppose that the carriers in Official Classification Territory demanded divisions east of Chicago, out of the joint rates from Omaha to New York, which were greater than the local rates of the same lines from Chicago to New York. Such evidence would indicate clearly that something was wrong with the rate structure, both as to the measure, and as to the relationship between the

rates from Omaha on the one hand and the rates from Chicago on the other.

Again, if it can be shown that carriers in one rate region or territory are attempting, by means of discriminations in divisions, to keep a given kind of traffic moving from certain points of production into particular markets, and to prevent like traffic from moving from competing points of production into the same markets, this evidence of divisions might become of great value as showing how the preferences or advantages were created, and how they ought to be removed.

The Commission has swung so far away from its original holdings with respect to the evidentiary value of divisions in rate cases, that in a recent case it reversed the ruling of an examiner and admitted in evidence the divisions upon one kind of traffic in New England Territory as compared with the divisions upon another kind of traffic in a different territory. However, the bearing of such comparisons upon the measure of the rates is often too remote to warrant the time which the complainant would consume in attempting to introduce such evidence.

Short-Hauling the Carrier. Section 15, paragraph 4, provides that in establishing through routes, the Commission:

. . . . shall not (except as provided in Section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: Provided, that in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

If the carrier offers as a defense to a complaint requesting the establishment of a through route the fact that such route would require it, without its consent, to embrace substantially less than the length of its line between the point of origin and destination, the complainant should be prepared to prove that the route proposed by him would be the practicable route, and that the route embracing the length of the objecting line would be unreasonably circuitous.

The Commission has had difficulty in applying the provisions of this Section where each of two or more carriers objected upon the same ground, namely, that it would be short-hauled. Frequently, in the establishment of a through route, some carrier may have to be short-hauled. Question then arises as to whether Section 15, paragraph 4, protects both carriers and, therefore, prevents the establishment of the desired route. The argument has frequently been made that the statute protects the carrier which already has the traffic. That is, it protects the first carrier in the route, which could claim that it would be short-hauled by the proposed route.

This theory finds expression in later decisions which hold that Section 15, paragraph 4, prevents the Commission from requiring a carrier "to turn traffic over to a connecting line when to do so would require it to participate in a through route embracing substantially less than the entire length of its line."^① In other words, the latest doctrine seems to embody the principle that the carrier first in line of route is the one entitled to protection where two are claiming Section 15, paragraph 4, as a defense.

In the *Montgomery Cotton Exchange Case*,^② the carrier's defense was that it could not be required to establish transit on the ground that this would require it to short-haul itself. The Commission held that this situation was not covered by Section 15, paragraph 4.

^① *The New York Harbor Case*, 47 I. C. C. 643, 722; and *Miller Paper Co. Case*, 80 I. C. C. 314, 317.

^② 109 I. C. C. 579, 584.

In the *Southern Class Rate Investigation*,^① the carrier's claim that the use of a certain rule for determination of distances in connection with scale rates would require them to short-haul themselves, was held to be without merit.

Routing of Freight by Commission. Section 15, paragraph 4, quoted above, confers upon the Commission the power to establish temporarily such through routes as may be necessary in times of emergency, in disregard of the short-hauling provision. This power is broad and illustrates the confidence which Congress places in the ability of the Commission to act wisely and promptly when necessary, without the intervention of other governmental agencies or direct legislation. The Commission has established a separate bureau, the Bureau of Service, which handles matters of this kind. The power may be invoked formally, informally, or, in cases of extreme emergency, by telegram or word of mouth.

The shipper, who asks that the Commission exercise this power, must be prepared to show in great detail the facts and circumstances upon which he relies, and they must be convincing. The Commission is not inclined to take action of this kind without a showing of actual necessity for it.

Traffic Unrouted by Shipper. Section 15, paragraph 10, provides that the Commission may, whenever the public interest and a fair distribution of the traffic require, route traffic which is not routed by the shipper. The statute leaves it to the Commission's judgment to determine when the public interest requires it to route traffic, and to ascertain the circumstances under which it may become necessary to make a fair distribution of the traffic. Administration of this provision is in the hands of the Commission's Bureau of Service.

^① 100 I. C. C. 513, 656.

It is doubtful whether the Commission would exercise this power unless an emergency existed, although the Act does not use the word "emergency." In other words, under ordinary conditions there is no occasion for the exercise of this power. It is probable that the Commission would not direct routing before some carrier or shipper made application for it to do so, stating substantial grounds and unusual circumstances in support of its request. Any such application would be informal in nature and would be handled by the Bureau of Service.

Routing in Emergencies. In times of congestion, such as occurred during the World War, and during the Florida boom period of 1925-1926, it may be necessary to route all loaded movement over one line and route all empty cars back over another line in order to clear congestion. This, of course, would be an emergency measure and the Commission could act to put it into effect under the car service provisions of Section 1, paragraphs 10 to 17, inclusive. This provision supplements paragraph 16 of Section 1, which empowers the Commission to route traffic so as to serve the public properly.

Routing of Freight by Shippers. Section 15, paragraph 8, gives the shipper the right, where competing lines of road constitute portions of through routes, to route his shipment. The routing, which must be designated in writing, is ordinarily filled in upon the blank designated for this purpose on the face of the bill of lading issued by the initial carrier.

Paragraph 8 of Section 15 also makes it obligatory upon the initial carrier to route the traffic as directed by the shipper, to issue a through bill of lading therefor as directed, and to transport the property over its line and deliver it to the correct connecting line. Each connecting line is required to turn the shipment over to the next correct connecting line comprising the designated route. Paragraph 9 makes any carrier, which is guilty of mis-

routing, responsible to the connecting lines in the designated route.

Misrouting is the cause of a vast number of claims against the carriers by the shippers, most of which are presented informally to the Commission. The Conference Rulings have provided for the settlement of many classes of misrouting claims without action upon the Commission's part.^①

The Commission has exclusive original jurisdiction over misrouting claims.^②

Reparation for Misrouting. The measure of damages in misrouting cases is the difference in the rates,^③ but consequential damages may be included. For example, in the *Johnson Case*,^④ the consequential damages were the cost of feed for the sheep and the cost of subsistence for the complainant and attendant during the period of delay occasioned by misrouting. The nature of the remedy is the same as, or akin to, straight overcharges under Section 6 of the Act. The carrier who is guilty of the misrouting is responsible for the full amount of rate and consequential damages.^⑤

In the absence of specific routing instructions, the duty rests upon the initial carrier to select the cheapest available all-rail route.^⑥ There is no duty upon the initial rail lines to select a rail-water route, which is cheaper than an all-rail route, unless the shipper specifies rail-water.^⑦

Proof of Misrouting. The evidence in misrouting cases must include the original bill of lading, the route designated thereon, and the route over which the shipment actually moved. The freight bill is necessary as evidence

^① Conference Rulings No. 474, 190, 316, 321, 147, 205, 214, 383, 286, 253, 502.

^② *Northern Pacific Ry. Co. v. Solum*, 247, U. S. 477.

^③ *De Bary Case*, 18 I. C. C. 527.

^④ 58 I. C. C. 3.

^⑤ *Slocum Case*, 38 I. C. C. 535.

^⑥ *Goodkind Bros. Case*, 21 I. C. C. 17.

^⑦ Conference Ruling 190; *Keaton Case*, 39 I. C. C. 221.

that the rate was higher over the route of movement than over the route specified. The record must also show which carrier was responsible for the misrouting. If the shipper is unable to obtain this evidence from the carriers, a demand therefor should be made at the hearing, or prior thereto.

This evidence, being peculiarly within the knowledge of the defendants, can be required of them. The Commission will compel the production of the necessary waybills in order to determine which carrier was responsible. The shipper should see to it that this evidence is adduced.

If the carriers are not prepared to furnish it at the hearing, a demand should be made upon them to furnish copies of the through waybilling to be filed as a supplemental exhibit subsequent to the hearing. Unless this is done, the Commission may not be able to issue an order of reparation, for this will not be done unless it is possible to fix the responsibility upon one carrier.

Rate comparisons, and the like, are not necessary in a misrouting case unless an allegation of unreasonableness or undue preference under the other major sections of the Act is coupled with the allegation of misrouting.

PRACTICAL APPLICATION

Problem. The Paris branch of the Missouri Pacific extends from a connection with the parent company, at Fort Smith east to Paris, Ark., 46 miles, where the Fort Smith, Subaco, and Rock Island R. R. begins and continues eastward for 40 miles to Dardanelle, Ark. At this point it connects with a branch of the Chicago, Rock Island & Pacific, which extends 14 miles north from its main line at Ola, Ark. This branch is operated by the Fort Smith, Subaco & Rock Island under agreement. Its point of interchange with the Chicago, Rock Island & Pacific is at Ola, and with the Missouri Pacific, it is at Paris.

The Fort Smith, Subaco & Rock Island in complaint filed with the Commission contends that existing routes via the Missouri Pacific are unreasonably long as compared with those embracing its line. Memphis is referred to as a representative point. Between Memphis and Paris via the Missouri Pacific the distance is 356 miles and via the Rock Island and complainant lines it is 262 miles.

The situation existing here is that on westbound traffic, the Rock Island would obtain a longer haul to its junction with complainant line at Ola, than if it turned the traffic over to the Missouri Pacific at a junction point east of Ola.

In view of the provisions of paragraph 4, of Section 15, of the Act, if you were representing the complainant in this case, what argument would you offer in support of routing via Rock Island to Ola?

Solution. The law provides that in establishing a through route the Commission may not require a carrier to embrace in such route substantially less than the entire length of its railroad which lies between the termini. There are, however, instances where two roads, connecting at various junctions, might form a through route between two points and in such a case the length of the haul for each would depend upon the junction point at which the interchange is made. As stated on page ... of this manual, the argument is frequently made that the statute protects the carrier which already has the traffic. In the case outlined above the Commission said: "In applying Section 15 (4) to a situation of this kind we have interpreted it to mean that the carrier which originates the traffic is entitled to the long haul."

TRAFFIC MANAGEMENT

MANUAL 68

GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION

HANDLING THE CASE

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THE PURPOSE OF THIS MANUAL AND TRAINING SUGGESTIONS

THE Interstate Commerce Act sets forth very simple rules of pleading and evidence. As to the former, it provides that any person, firm, corporation, or any mercantile or other organization, or any common carrier may file a petition stating briefly the facts complained of, against any common carrier subject to the Act, and that the Commission shall then forward a copy of it to the carrier or carriers complained of, who shall satisfy or reply in writing.

The Commission is then empowered to investigate the matter, and the principal rule of evidence specified in the Act is that all parties in interest shall be given a full public hearing. When this simple procedure has been pursued the Commission is authorized to exercise its discretion and, after consideration of all the facts of record, to make its findings and enter an appropriate order.

The interest of the shipping public in the Interstate Commerce Commission centers, primarily, in the power of that body to hear evidence and to determine what constitutes reasonable practices and rates of transportation and whether existing rates and practices are, or are not, free from unjust discrimination and undue preference.

The interest of the carrier, also, centers in the Commission's exercise of these functions. The source of this interest is readily apparent, for, whereas transportation services and freight rates are important factors in the successful operation of an industrial enterprise, to the carrier the former represents a considerable element in its cost of production, while the latter is actually the selling price of its product.

It is the purpose of this manual, therefore, to sketch, in a simple and direct manner, the procedure involved in the exercise of these fundamental remedial powers and the steps:

1. By which a shipper may bring to the Commission's attention conditions which, in his opinion, constitute violations of the Act and through which he may secure relief if the facts developed uphold his contention.
2. By which a carrier may defend itself before the Commission and thus forestall unduly burdensome increases in its cost of rendering transportation service, or reductions in its revenue.

TRAFFIC RESEARCH STAFF

The diversified traffic experience of the members of the Traffic Research Staff embraces work in the governmental, railway, steamship, highway, industrial, and educational fields. Each member is especially qualified by training and experience to co-operate in the work of investigating, planning, organizing, and presenting the training material and to co-ordinate the contributions of the various authors into a well-organized and effective course.

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Chapter I

LEGAL BASIS FOR PROCEDURE BEFORE THE INTERSTATE COMMERCE COMMISSION

TO HANDLE expeditiously the large volume of complaints filed with the Interstate Commerce Commission each year and, at the same time, do equal justice to all parties concerned, the Commission must necessarily follow a well-defined and orderly plan of procedure. Congress, in enacting the Interstate Commerce Act, recognized this need and gave the Commission authority to draft the rules to be observed in hearing and disposing of complaints arising under the Act.

In this chapter, attention is directed to the legal basis of the rules which were adopted pursuant to this authorization, and to the considerations which guided the Commission in framing them.

Legal Authority for Commission and Its Procedure. The Constitution of the United States provides that Congress, the legislative branch of the government, shall regulate commerce between the states. Under this provision, known as the commerce clause, Congress has enacted the Interstate Commerce Act, creating the Interstate Commerce Commission, an administrative tribunal with quasi-legislative^① and quasi-judicial duties and powers. These duties and powers are designed for the purpose of carrying out and enforcing the statutes pertaining principally to the regulation of common carriers of certain classes, including the railroads engaged in interstate commerce.

In this manual, consideration is confined to those fundamental sections of the Act under which the Commis-

^① The prefix "quasi" indicates: in the nature of, or resembling; that the things compared resemble one another, but that there are essential differences.

sion proceeds. Throughout the discussion it should be borne in mind that the Commission is an arm of Congress which is the law-making branch of the Government, and that it has no connection with either the judicial or executive branch.

Provisions of Act. Section 17 of the Act contains the provision that the Commission may conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice"; and further, that the procedure and forms shall follow "those in use in the courts of the United States."

The only rule of evidence actually found in the statute is that in Section 13 which permits the Commission to enforce the law only "after full hearing" of all interested parties.

Commission's Policy in Formulating Rules. The Commission has always held to the view that practice before it should be as simple and devoid of technicalities as possible. Procedure must, however, be in accordance with the steps outlined in the statute, in order that its findings may be binding upon the parties.

With this twofold requirement in view, the Commission has drafted its plan of procedure, making it as simple as possible, yet safeguarding it so that technicalities cannot be successfully raised, in the event that an order is finally assailed in the courts. The procedure involved in the consideration of each case is symbolized in the formal wording of the Commission's order which is issued at its close. The order sets forth the fulfillment of the terms of the Act as follows:

This case being at issue, upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having made a full report containing its findings of fact and conclusions thereon, it is ordered that * * * * *

The requirements which the Commission imposes upon the carrier follow this preliminary statement.

Parties Eligible to File Complaint. Section 13 of the Act provides that any party may file a petition or may complain to the Commission of any act, on the part of carriers under the Commission's jurisdiction, that is declared by statute to be unlawful.

Rules of Practice. Many of the provisions contained in the Rules of Practice before the Interstate Commerce Commission^① do not require special explanation. All are important and should be carefully read in order that their requirements may not be overlooked or misunderstood. Thus Rule I, relative to public sessions and hearings, and Rule II, relative to parties to proceedings, are passed over and attention is directed first to Rule III.

Paragraphs (a) to (i) inclusive of Rule III provide the methods of presenting complaints and describe the manner in which complaints should be drafted. The first of a number of approved forms, included in the pamphlet in which these rules of practice are published, provides the skeleton form of a complaint, with instructions describing what each paragraph should contain.

• Rules X to XIII inclusive, cover hearings, and certain means and methods of introducing testimony, oral and documentary. Rule XIV deals with the subject of briefs and oral argument. It contains a description of the methods of drafting and printing a brief.

Rules III and X to XIV, inclusive, provide the main subjects of this text, namely:

1. Complaints.
2. Hearings.
3. Briefs, oral argument, and other proceedings subsequent to the hearings.

Facts in a Typical Case. In the following discussion a typical set of facts, such as are made the basis of many actual cases, is employed to illustrate the various steps

^①The copy of this pamphlet which was sent to the reader with the manual, PROCEDURE IN RATE MAKING, should be referred to constantly in connection with the following discussion.

in procedure before the Commission under the rules prescribed for the presentation of complaints, the introduction of testimony at hearings, and the drafting of briefs and arguments. The presentation of this typical case is followed through all of the usual and ordinary channels.

The Shipment. The Youngstown Pipe & Supply Co., of Youngstown, Ohio, shipped ten carloads of cast-iron pipe to Milwaukee, Wis. The shipments were unrouted and moved over the Pennsylvania R. R. to Chicago, Ill., and over the Chicago & North Western Ry., beyond.

The Charges. Charges were collected on the basis of the local rate of 34 cents per 100 pounds to Chicago, and the local rate of 14 cents beyond. A joint rate of 40 cents from Youngstown to Milwaukee was contemporaneously in effect over the Pennsylvania R. R. in connection with the Pere Marquette Ry. through Ludington, Mich., and by car ferry beyond to Milwaukee.

The Basis for the Complaint. Mr. R. H. Brown, president of the Youngstown Pipe & Supply Co., and Mr. N. D. Moody, his traffic manager, feel that there is something wrong with this rate situation, and decide to make a test case of the ten carload shipments. Their plan includes recovery of the charges over and above those which would have accrued on the basis of the joint rate of 40 cents and, in addition, having the rate of 40 cents published through the Chicago gateway for application on future shipments.

Mr. Brown calls in conference Mr. C. E. Whitney, the lawyer who handles all legal matters for the firm, but who is not experienced in handling cases arising under the Interstate Commerce Act, or familiar with the Commission's rules of practice, and its procedure. Mr. Moody gets from his files a copy of the Interstate Commerce Act and a copy of the Rules of Practice before the Commission. He then produces his railroad freight tariffs, the freight bills, and the bills of lading, and explains the routes and meth-

ods of obtaining the rates. He also maps out the two routes and the junction points of the connecting lines, and furnishes the lawyer with the dates of the shipments and the dates of delivery. Together they determine that the Commission has jurisdiction over the subject matter, and the specific section of the Act upon which the complaint should be founded.

Form of Complaint. They first consider whether the initial presentation of the case should be made formally or informally, and decide upon the latter. Mr. Moody then confers with the traffic officials of the interested carriers but finds them unwilling to adjust the situation voluntarily.

In the following chapters the steps in the preparation and submission of the complaint based upon the facts here outlined, are traced in narrative form. The procedure is followed through all of the stages, informal and formal, until the final decision is given by the Commission.

PRACTICAL APPLICATION

Problem. The charges assessed on the ten carloads of pipe shipped by the Youngstown Pipe & Supply Co. from Youngstown, Ohio, to Milwaukee, Wis., were based on the legally applicable rate of 48 cents via Chicago, the route over which the shipments moved. This being so, what ground did Mr. Moody have for feeling that the charges should not have been more than if the shipments had moved via Ludington, Mich., via which route a joint rate of 40 cents was in effect?

Solution. Shipments were tendered to the Pennsylvania lines un-routed, and in the absence of specific routing instructions the duty rested upon the Pennsylvania, the initial carrier, to select the cheapest available all-rail route. The shipments were, therefore, misrouted. (See Conference Ruling 316.)

Chapter II

THE INFORMAL COMPLAINT

THE simplest procedure before the Commission occurs upon what is designated by the Commission as the informal docket. This docket, for which there is no statutory provision, is the one upon which informal complaints are handled.

Form of Informal Complaint. A letter written in the ordinary language of business correspondence is the accepted form for drafting an informal complaint. The experienced lawyer, however, has his informal complaint prepared with the same care which he exercises in presenting a formal complaint.

Substance of Informal Complaint. The letter containing the informal complaint, although divested of the legal phraseology peculiar to technical pleading in court, must in compliance with paragraph (c) of Rule III,^① contain all of the essential substance of a formal complaint, including:

1. The name and address of the complainant.
2. The names of the carriers against whom complaint is made.
3. A statement that the statute has been violated by the carriers named. This statement should indicate when, where, and how the violation occurred.
4. A specific request for affirmative relief.

As a result of the conference between the three men, it is decided to have Mr. Whitney take the matter up with the Commission as an informal complaint.

The letterhead of the Youngstown Pipe & Supply Co., on which the complaint is sent to the Commission, takes

^① Rules of Practice before the Commission.

care of the first of the four requirements outlined above, as it furnishes the name and address of the complainant.

The second is covered by stating in the letter the full corporate names of the several defendants: The Pennsylvania Railroad Company; Chicago and North Western Railway Company; and Pere Marquette Railway Company. As three defendants are named, four copies of the letter are prepared so that the Commission may retain one and transmit one to each of the carriers named.

The letter which is drafted not only narrates the facts of the shipments, but specifies, in tabulated form as this is preferable:

1. The commodity.
2. Point of origin.
3. Point of destination.
4. Route of movement.
5. Car numbers and initials.
6. Weights.
7. Rates applied.
8. Charges collected and paid.
9. Rate sought by complainant as a basis for past relief and for the future.
10. Amount of reparation due as damages on past shipments with,
 - (a) Dates of delivery.
 - (b) Dates of bills of lading.
 - (c) Dates of freight bills or date of "paid" stamp appearing on face of freight bills.
 - (d) Routing in the bill of lading.
 - (e) Rate, if any, inserted on the face of the bill of lading.

As the number of shipments for which this claim is being entered are relatively few, only ten, the freight bills and bills of lading are attached to the letter to the Commission.

Selecting the Allegation. Mr. Whitney decides, wisely, that it is not sufficient to state merely that the carrier has violated the Act, but that he must give as much care and thought to the statement of the specific violations upon which he intends to rely, as if he were filing a formal complaint. He realizes that it is of utmost importance that he determine at the outset a sound theory on which to base the complaint.

Under Section 1. Mr. Whitney finds that charging an unreasonable rate is unlawful under Section 1 of the Act, and infers that the informal complaint should be founded upon that allegation alone. Mr. Moody, on the other hand, knows from the study which he has devoted to this particular subject that if they base the informal complaint on an allegation of *unreasonableness* alone they may lose on this ground only to find later that they could have won on the ground of *misrouting*. In that event, having laid no foundation for a misrouting case in the informal complaint, the statute of limitations might have run with the result that the claim for reparation on the ten shipments would be barred from consideration. Moreover, he insists that the real basis of the complaint is misrouting. The lawyer then pursues his study of the Act from cover to cover without finding any reference whatsoever to misrouting and decides that the Act does not make misrouting an unlawful act. As both men are obdurate, each convinced that he is right, they finally compromise by laying a double foundation for their case, *unreasonableness* and *misrouting*. This decision is well taken for in practice before the Commission ordinarily it is wiser to allege too much than too little, although there are exceptions to this rule.

Under Section 3. Mr. Brown then brings up another point. He thinks that the question which concerns him primarily is the relationship between the rates from Youngstown in comparison with those from competing points. While, if the facts warrant, an allegation of *undue*

prejudice against the Youngstown Pipe & Supply Co., and of *undue preference* of his competitors, may be added to the complaint, care must be taken in adding this allegation under Section 3 of the Act, because, under some circumstances it may react unfavorably on the complainant. Mr. Moody and Mr. Whitney are somewhat hesitant about agreeing to this suggestion as the facts do not appear to warrant setting up an allegation of undue prejudice.

Under Section 4. Next, Mr. Moody decides to examine the tariffs carefully to see whether there are any lower rates to points beyond Milwaukee, or if any of the joint rates involved exceed the aggregate of intermediate rates. He also checks the combination of rates on Chicago against other combinations to see whether the rate charged was actually the lowest combination available. If this search should develop any departures from the long-and-short haul provision, or the aggregate-of-intermediate rates provision, of Section 4 of the Act, an appropriate allegation of a violation of that Section would, of course, be included in the complaint. In this case the search does not disclose any violations of Section 4.

Under Section 6. Next, in order that no point may be overlooked, Mr. Moody scans the tariffs carefully to determine if, perchance, any question of tariff interpretation raises doubt as to whether the rates charged were legally applicable. If such a condition were found to exist, it would be necessary to add an allegation that the rates charged were *illegal* under Section 6 of the Act. However, his investigation reveals no indication that the rates charged were illegal and the informal complaint is framed, upon the two allegations of:

1. Unreasonableness.
2. Misrouting.

Request for Affirmative Relief. Following the allegation, the letter, as it should, makes a request for affirmative

relief. As this is a misrouting case, no prayer for future relief is necessary because the complaint is based upon the facts of actual shipments which have been made. The underlying principle in such a case is that the agent of some carrier has been negligent in not sending the shipment over the route taking the lowest rate available to the shipper.

Mr. Moody knows that—

A prayer for future relief should always be made in cases of alleged unreasonableness, whether reparation on past shipments is sought or not, unless, subsequent to the movement of the shipments, the carriers have voluntarily changed the rates to the basis sought by the shipper.

As, in this case, the carriers have not taken such voluntary action, it is decided that the informal complaint should ask reparation under allegations both of unreasonableness and of misrouting, and should also ask that the Commission establish, for the future, the rate of 40 cents over the route of movement, namely, by way of Chicago.

Handling of Informal Complaint by Commission. When the letter from the Youngstown Pipe & Supply Co. reaches the office of the Commission in Washington, it is referred, through the office of the Secretary of the Commission, to the Commission's Bureau of Informal Cases. That Bureau is composed of a number of attorneys who are specially trained in handling informal complaints of this character. The letter is assigned to one of these attorneys who studies the facts, dictates a letter of acknowledgment to Mr. Moody, and forwards the copies of the complaint to a designated traffic official of each of the interested carriers, with the request that they advise the Commission of their attitude towards the complaint. This correspondence passes through the office of the Chief of the Bureau and through the office of the Secretary into the mails, over the signature of the Secretary.

Advice of Commission to Carriers. The attorney in the Bureau who has reviewed the complaint is of the opinion that the facts show a clear case of misrouting. He advises the carriers of his opinion and suggests that they pay the claim for reparation direct to the shipper under authority of Conference Rulings 397^① and similar decisions of the Commission, without any further action on the part of the Commission.

Carrier's Reply. In replying to this letter the carriers take the stand that, in their opinion, there is no duty on defendants' agents to route the shipments over a route partly by rail and partly by water, namely in connection with the Pere Marquette Ry., and that therefore they are unwilling to make a refund direct to the complainant. Upon receipt of this reply the Commission, through the Bureau of Informal Cases, advises Mr. Moody of the position that the carriers have taken.

Proposal to Place on Special Docket. At the same time the Commission writes the carriers to find out whether they would be willing to submit the facts on the Commission's Special Docket and put the rate of 40 cents into effect by way of Chicago. A copy of this letter to the carriers is sent to Mr. Moody with the suggestion that he take the matter up with the carriers direct, with a view to presenting the question of reasonableness on the Special Docket. The Commission's letter also advises Mr. Moody that the informal complaint is closed and that if he wishes to pursue the matter by formal complaint it will be necessary to file the complaint within six months from the date of the Commission's letter.^②

Preparation and Submission of Special Docket Application.^③ Now, to illustrate the use of the special docket, assume that the carriers admitted that, under Conference

^① A copy of Conference Rulings Bulletin No. 7, Interstate Commerce Commission, was sent to the reader with the manuals on Government Regulatory Bodies.

^② Rules of Practice before the Commission, Rule III (g).

^③ Rules of Practice before the Commission, Rule III (f).

Ruling 316, they were guilty of misrouting these ten car-load shipments of cast-iron pipe and that the rate assessed was unreasonable; likewise, that they were agreeable to submitting an application to the Commission for authority and an order to pay reparation on the shipments on the basis of the joint rate of 40 cents applicable over the competitive route. The procedure in that event would be as follows.

Upon receipt of advice to this effect, Mr. Moody furnishes the carriers with all of the details of the ten shipments. The carriers then prepare a special docket application, a form issued by the Commission for this purpose. This, when made out, signed, and sworn to by the proper officials of the carriers, is forwarded to the Commission. In this application the carriers set out the facts and ask permission to make the award to the Youngstown Pipe & Supply Co.

The Commission passes the application to the section of the Bureau of Informal Cases which handles all special docket applications. A skilled attorney examines it to find out, first, if the carriers have made the necessary admission that the rate charged over the route of movement was unreasonable; second, if the rate of 40 cents has been put into effect over the route via Chicago; and third, if there were facts submitted in proof of the unreasonableness of the rates charged and of the alleged misrouting. In the event that the Commission finds that the application meets all of these conditions, an order to pay the reparation is issued. However, if the conditions are not met, the Commission denies the application and so advises the carriers. The carriers, in turn, advise the Youngstown Pipe & Supply Co. of the Commission's action.

All matters on the Special Docket are handled informally by correspondence. The purpose and use of this docket has been explained by the Commission in Conference Ruling 200 (d), as follows:

The suggestions that have come to us from various quarters in relation to the conduct of the special reparation docket indicate that some misapprehension exists as to the purpose of that docket, and as to the authority of the Commission in dealing with such cases. It may be well, therefore, to say that our action in special reparation cases has no authority in law except the authority upon which we take similar action in formal cases. In all cases, whether on the formal or the special docket, the law in Section 15^① specifically requires a complaint and answer and a full hearing; and in Section 14^① it is provided that where damages are awarded the report of the Commission shall include the findings of fact on which the award is made. We have endeavored to simplify the procedure on the special docket by accepting the application of the carrier as the equivalent of a complaint and answer, and by accepting its admission that the rate charged under the circumstances then existing was unreasonable as a sufficient compliance with the requirements of Section 15 for a full hearing.

Informal Registration to Stop the Running of the Statute of Limitations. Sometimes, however, considerable time elapses between the date that the carriers agree to submit the special docket application and the date on which it is filed and either accepted or rejected by the Commission, and notice of their action is sent to the complainant. In that event, in order to prevent the running of the statute of limitations, it is necessary for the complainant, in this instance the Youngstown Pipe & Supply Co., to write to the Commission from time to time, stating the stage in which the matter stands and asking that the entire informal filing be kept open. This same purpose may be accomplished by *registering* the informal claims with the Commission.^②

Claims may also be registered in cases where the shipper is drafting a formal complaint and needs additional time in which to have the formal complaint prepared or printed. Thus, in the case sketched in this chapter, it would be necessary to take these precautions if the complaint had not already been presented informally.

^① Of the Interstate Commerce Act.

^② Rules of Practice before the Commission, Rule III (f).

Conclusion. In conclusion, with respect to matters presented informally to the Commission, it is well to place special emphasis on two important requirements:

1. The informal presentation must contain all of the essential elements of a valid complaint.
2. The matter must be diligently pursued to avoid the elimination of any original issues and to avoid the running of the statutory limitations.

PRACTICAL APPLICATION

Problem. If you were representing the Youngstown Pipe & Supply Co. in the case outlined in Chapter I, on what allegations would you base the informal complaint?

Solution. From the facts given in pages 3 and 4 informal complaint should allege "unreasonableness" and "misrouting."

Chapter III

THE FORMAL COMPLAINT

IN THE preceding chapter the proceeding under the informal complaint was traced to the point where the carriers indicated that they would not voluntarily make a refund to the Youngstown Pipe & Supply Co., and the Commission had advised Mr. Moody that the informal complaint was closed. Mr. Moody decides, however, not to let the matter drop, but to file a formal complaint. This, as he has been advised, must be done within six months from the date of the Commission's notice that the informal complaint is closed.

As the file on the informal complaint contains all of the material necessary for the drafting of a formal complaint, Mr. Whitney relies upon it for the statements of facts which he uses in the formal complaint. However, as he is a general practitioner and not a commerce attorney, and is therefore more or less unfamiliar with the Commission's requirements relative to the form in which this complaint should be drafted, he reviews carefully Rule III, paragraphs (h) to (r), inclusive, of the Rules of Practice of the Commission, paying especial close attention to the approved form of complaint published in this pamphlet. Mr. Moody says he has heard that, although these rules and the form are apparently clear and concise, a high percentage of the formal complaints filed with the Commission have to be returned for alteration, and that, in many cases they even have to be reprinted by the complainant, thereby causing considerable expense and delay. This only serves to emphasize Mr. Whitney's opinion that the correct preparation of the complaint in the first instance is exceedingly important.

Preparation of a Formal Complaint. Mr. Whitney, having previously decided to present the case under the two fundamental issues of unreasonableness and misrouting, has his underlying theory already in mind when he begins to draft the complaint. In following the Commission's rules he pays especial heed to the following features which he recognizes as essential to the proper preparation of the complaint.

The Caption. As the name of the complainant he inserts the exact full name of the firm under which Mr. Brown is doing business, Youngstown Pipe & Supply Co. The exact corporate names of the defendants must also be shown, as the Commission will not receive a complaint unless the names of all parties to it are accurately stated. For instance, the caption "The Chicago & Northwestern Railroad Company" contains four errors, any one of which will cause the complaint to be rejected. The correct defendant is the "Chicago and North Western Railway Company."

To make certain that no errors are made in showing the names of the railroads, Mr. Whitney secures from the Government printing office a copy of its *List of Corporate Names of Common Carriers*, for he knows that the current issue of this publication is the only safe authority. He has found from experience that the *Official Guide of the Railways*, and even the carriers' own published tariffs, do not always give the corporate names of the railroads correctly. He names all of the carriers comprising one or more of the through routes, but avoids adding any carrier's name unnecessarily.

Legal Status of Complainant—Paragraph I. Next, he draws up paragraph I of the complaint, inserting a description of complainant's legal status and the nature of his business, thus:

That Youngstown Pipe & Supply Co., a corporation, is engaged in the manufacture and sale of cast-iron pipe at Youngstown, Ohio.

If there has been any change in the legal status of the complainant during the period for which reparation is asked, Mr. Whitney would have to explain the change fully, giving the names of partners if not incorporated, the exact date of the change, and stating whether the assets of the predecessor company inured to the benefit and title of the successor company, firm, partnership, or corporation.

Description of Defendant Carriers—Paragraph II. In paragraph II, Mr. Whitney describes the defendant carriers, using the exact wording of the approved form.

Statement of Facts—Paragraph III. In paragraph III and succeeding paragraphs, Mr. Whitney puts a clear and concise statement of all of the facts in the case, and the important facts developed in the informal proceedings. In paragraph III, he includes the tariff references, the tabulated details of the shipments, reference to the date on which the informal complaint was filed, the Commission's informal file number, and the number of the special docket application.

Allegation of Unreasonableness—Paragraph IV. For paragraph IV, he frames a statement to the effect that the charging of the full combination of local rates, specified in paragraph III, from Youngstown to Chicago and beyond to Milwaukee, resulted in the collection of charges for the through transportation which were, still are, and for the future will be unjust and unreasonable to the extent that the rate exceeded, exceeds, or may exceed 40 cents per 100 pounds; and that the present through combination rate of 48 cents over the route of movement is, to the same extent, unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act.

Statement of Routing—Paragraph V. He embodies in paragraph V a statement to the effect that the shipments

described in paragraph III were tendered to the Pennsylvania R. R. at Youngstown unrouted, that is to say, with no routing specified by the shipper upon the face of the bill of lading; that the shipments were routed by the defendants over a higher rated route, namely via Chicago, instead of over the route in connection with the Pere Marquette Ry., through Ludington, and by car ferry beyond to Milwaukee; that by reason of the failure of the defendants' agents to route and forward the shipments over the route through Ludington, the lower rated route, the defendants thereby caused to be collected from the complainant charges that were unreasonable and unlawful by reason of the said misrouting.

It is important to note that, in conformity with paragraph (i) of Rule III, Mr. Whitney places the allegations of "unreasonableness" and of "misrouting" in separate paragraphs.

Statement Relative to Increase in Rates—Paragraph VI. Paragraph VI states, as required by paragraph (k) of Rule III, that the rates specified in paragraph III have been increased since January 1, 1910. A brief historical statement of such changes, with the dates of the changes, is prepared by Mr. Moody, and inserted. This historical survey provides a basis for Commission's determination of whether the burden of proof is upon the defendants. It would be exceedingly unwise for Mr. Whitney to rely upon the increase of June 25, 1918, under the Director General's General Order No. 28, or the general increases of August 1920, authorized by the Commission, as a basis for contending that the burden of proof is upon the defendants. Therefore, all changes subsequent to January 1, 1910, are noted.

Allegation of Undue Prejudice—Paragraph VII. Had an allegation of undue prejudice been included, in line with Mr. Brown's suggestion, it would be necessary to add

a separate paragraph, setting out with careful particularity: (1) the alleged preferred points; (2) the rates applicable thereto; (3) that the Youngstown Pipe & Supply Co. is in competition with others; and (4) in what way the rate situation adversely affects complainant's business.

Allegation of Fourth Section Violation—Paragraph VIII. If Mr. Moody had discovered any Fourth Section violations, or departures, another paragraph, this one containing an allegation of a violation of Section 4 of the Act and stating with particularity the rate situation relied upon in support of this allegation, would be added.

Illegal Rates Allegation—Paragraph IX. Again, if Mr. Moody had discovered that the rates were illegal under Section 6, a separate paragraph would be necessary.

In support of a Section 6 allegation specific reference should be made to the tariff items relied upon.

It is well to quote the exact wording of the tariff provisions, especially if their application or interpretation is doubtful or ambiguous. In the case of tariffs which are unduly complex or difficult to interpret or understand, it is advisable to mention this fact in the complaint as a basis for a request that the tariffs be revised and simplified.

Statement of Damages Sustained—Paragraph X. In paragraph X, Mr. Whitney states that the complainant has been damaged by the payment of the charges under the rates assailed and by reason of the misrouting to the extent of the difference between the charges paid and those that would have accrued under the rate of 40 cents per 100 pounds, on each of the shipments made. On a sheet attached to the complaint and marked Appendix A,^① he makes a statement of the details of the ten shipments. This statement includes, for each car:

^① See Form No. 5, Rules of Practice before the Commission.

1. Date of shipment.
2. Date of delivery, or tender of delivery.
3. Date charges were paid.
4. Car initials.
5. Car number.
6. Point of origin.
7. Point of destination.
8. Route.
9. Commodity.
10. Weight.
11. Rate, as charged.
12. Amount of charges.
13. Rate claimed or sought.
14. Amount of charges under rate claimed or sought.
15. Amount of reparation claimed.

In making up a Rule V statement,^① the Appendix A information, made up as described, can be copied in the spaces provided for this purpose on Form No. 5, and properly certified.

REPARATION ON PRESENT AND FUTURE SHIPMENTS. Paragraph X states further, that the shipments listed in Appendix A are those which have been made prior to the filing of the complaint; that the complainant will continue to make shipments during the course of the proceedings; and that the complainant asks that reparation be awarded on all like shipments made until such time as the Commission shall have ordered the rate reduced and until such rate shall have become effective. The wisdom of preparing this type of reparation claim, called a "continuing" reparation claim, unless the shipper is sure that there is no possibility of his making any additional shipments after the complaint has been filed, is readily apparent.

Had the shipments involved been very numerous, description of a single typical shipment and an estimate of

^① For further explanation see page 42.

the total number of similar shipments would have sufficed. However, including a complete list of all shipments, as Mr. Whitney did in this case, is the only absolutely safe method.

Proof of Complainant's Interest. This paragraph also includes a statement of facts which will show that the complainant is the real party in interest and is the one entitled to the reparation claimed. It states that:

1. The shipments were made f.o.b. Milwaukee.
2. The charges were paid by Youngstown Pipe & Supply Co., the consignor, at the point of origin.
3. Their price to the consignee was based upon Milwaukee delivery.
4. The consignee did not reimburse them in any manner with the amount of the freight charges as such.

In drafting this paragraph, Mr. Whitney is aware that where reparation or damages are claimed before the Commission, the manner, method, and substance of the proof offered in support of the allegation of, and prayer for, damages must be as definite and specific as in a court of law. He knows that unless this is so, the order of the Commission, resulting therefrom, is unlikely to be upheld by the courts should the carriers refuse to pay.

Mr. Whitney finds that the laying of the foundation for an award of damages or reparation based upon the differences in rates is comparatively simple. This is also true of misrouting cases, and cases brought under Section 6 of the Act alleging that the rates are illegal. However, proof of damages in Section 2, Section 3, and Section 4 cases, under allegations of discrimination, undue prejudice, and Fourth Section violations, abounds in technical difficulties and for this reason can scarcely be handled successfully by other than an experienced interstate commerce lawyer. Review of previous cases makes it evident that these sections have been so construed by

the courts as to make them almost useless as a means of reparation.

Summary of issues. Paragraph X of the complaint also contains a summary of the issues, and the concluding paragraph sets forth specific prayers for future relief and for reparation. As the form of complaint in the APPROVED FORMS attached to the Rules of Practice before the Commission gives the summary of issues and prayers completely, with only a few blanks to be filled in, this form is used almost verbatim.

Signatures. The complainant, in the person of Mr. Brown, president of the Youngstown Pipe & Supply Co., signs the complaint, and gives his post office address. Mr. Whitney, as attorney for the complainant, signs below Mr. Brown and gives his post office address. Lest the signatures should not be perfectly legible, the names are printed below the signatures. The Rules of Practice before the Commission do not require that a formal complaint be sworn to or acknowledged.^① The complaint may state the place where hearing is desired, but the Commission is not bound thereby.

Printing Specifications. After drafting the complaint, Mr. Whitney refers to Rule XXI to determine the size, shape, weight, folio base, margins, kind of type, and other specifications of a similar nature which must be complied with. He notes that the number of copies which must be sent to the Commission includes one for each defendant named, and at least three for the Commission's own use. He decides to have a number of additional copies printed and retain them in his own office to take care of possible interveners or additional defendants.

Service of Complaint. After receiving the complaint, checking it, and filing it in the Bureau of Dockets, the

^① Rule III (h).

Commission makes service upon the named defendants.^① If the complaint is incomplete or improperly drawn, the Bureau of Dockets will return it for correction. It is surprising how frequently this is necessary. After the complaint is accepted it is given a docket or serial number. The number, in this case No. 18597, represents the total number of formal complaints docketed by the Commission, from its inception in the year 1887, to the date the complaint is filed.

Answers. As required by Rule IV, answers to this formal complaint must be filed with the Commission within twenty days. Usually, the answer is equivalent to a general denial and will play no important part either in the pleadings or in the subsequent procedure. There is no absolute requirement on the part of the Commission that the carriers file an answer. If they do not, the Commission, under Rule IV (b), considers that the issue is joined at the expiration of the twenty days.

Interveners. After the complaint of the Youngstown Pipe & Supply Co. has been docketed and published, the Laughlin Steel Company of Pittsburgh, Penn., learns of it and, having an interest in the rates on cast-iron pipe from Pittsburgh to Milwaukee, decides to intervene. Its traffic manager writes to Mr. Brown at Youngstown and asks for a copy of the complaint and Mr. Brown's office supplies it.

Form of Petition of Intervention. The Laughlin Steel Company then drafts a petition for leave to intervene, using Form No. 3 of the APPROVED FORMS. This form is clear and needs no explanation. As required by paragraph (e) of Rule II of the Rules of Practice, the petition sets forth the grounds of intervention, and the interest of the petitioner in the proceeding. As reparation is sought, this petition must conform to all the requirements of a formal complaint.

^① Rule VI (a).

The rules relative to printing and the number of copies are the same for this petition of intervention as for the formal complaint. It is preferable to file the petition of intervention with the Commission in Washington in sufficient time to permit service upon defendants and complainant prior to the hearing.

Ground of Intervention. The Laughlin Steel Company asks, in its petition, that the Commission consider the rates from Pittsburgh to Milwaukee at the same time that it considers the rates from Youngstown, on the ground that these points have been grouped and have always taken the same rates to Milwaukee.

Handling of Petition by Commission. When this petition is received by the Commission it will decide whether the petition should be granted or denied.

Practically the only reason for denying an ordinary petition of intervention is on the ground that the petition "unduly broadens" the issues.

In this case, the Commission decides that since the carriers are the same, the destination is the same, the commodity is the same, and the points of origin are grouped, the petition does not unduly broaden the issues. The Commission accordingly notifies the parties that the petition has been granted and serves a copy of its order, granting the petition, and a copy of the petition, upon all parties to the case.

It might have been impracticable, as is sometimes the case, for the intervener to present the petition prior to the hearing. In that event copies of the petitions would have been distributed at the hearing to all parties to the case, and the question of granting the petition submitted to the presiding examiner or commissioner for his consideration at the opening of the hearing. After the petition of intervention has been granted, the Laughlin Steel Company becomes a "party to the proceeding" and is entitled to the same rights and privileges as the com-

plainant, but can claim no rights which the original complainant, the Youngstown Pipe & Supply Co., has not.

The Commission's policy tends to discourage the granting of petitions of intervention after the hearing has begun, although exceptions are sometimes made where circumstances justify the tardiness of the petitioner, and for "good cause shown." This rule does not apply to protestants in so-called "Investigation and Suspension" cases.

Protests.^① After the complaint and answers have been filed, the Pere Marquette decides that, rather than have its route involved in this case, it will increase the rate from Youngstown and Pittsburgh to Milwaukee. It therefore instructs the Pennsylvania Lines to issue a supplement to the tariff. This the Pennsylvania is reluctant to do because it hopes to use, as an argument in support of the present rates through Chicago, the fact that the complainant has the Ludington route open to him at the lower rate, and that therefore there is no need of reducing the rate via Chicago for the future. The Pere Marquette insists, however, and the new schedule is filed with the Commission, to become effective within thirty days.

The Youngstown Pipe & Supply Co. and the Laughlin Steel Company immediately wire the Commission and call attention to the fact that these rates are in controversy in formal complaint No. 18597. They point out, briefly, that the rate proposed over the Pere Marquette's route is the equivalent of the full combination of locals on Chicago, and that the proposed increase will result in unreasonable rates. A copy of this protest is mailed to the Pere Marquette Railway Company at the time it is sent to the Commission.

Investigation and Suspension Proceedings. The Commission's "Suspension Board," a body of special tariff men who devote practically all of their time to tariff changes

^① Rule XIX.

of this character, informs the carriers of the protests filed by the Youngstown Pipe & Supply Co. and the Laughlin Steel Company, and calls upon the carriers to present quickly, their reasons and grounds for the proposed change. To save time the carriers' replies to the Commission are communicated by wire. The Suspension Board advises the carriers that their reasons do not appear to justify this action while the formal complaint is pending and suggests that they withdraw the tariff and avoid the issuance of an order of suspension.

The carriers accede to this view of the Suspension Board and file a Sixth Section Application for authority to withdraw the proposed schedule.

Not all suspension proceedings are handled in just this way. Often, when the parties can appear in person the Suspension Board considers these questions informally in its own office in Washington. No formal record is made of the so-called hearings, more correctly described as conferences, before the Suspension Board. If, upon an *ex parte* presentation of facts in this informal manner, by letter, by telegram, or orally, the Board is of the opinion that the schedules should be suspended, they make their recommendations to a special Division of the Commission which acts upon practically all cases of this nature. This Division's action in ordering suspensions is *ex parte*, and the order is issued without formal report or findings.

Essentials of a Valid Protest. It would not have been sufficient for the complainants to wire or write to the Commission simply asking that the proposed schedule of changed rates be suspended. The protest, although simple and entirely informal, must show upon its face a valid reason for the suspension; be filed in writing or by telegram at least ten days before the effective date of the proposed changes; and contain specific reference to the I. C. C. number of the tariff containing the existing rate, as well as the number of the tariff, or supplement bear-

ing the proposed change, and to the specific items. If the initial protest were made by telegram it would be necessary to follow it by a letter. Seven copies of this written application must be supplied for the use of the Commission.^①

After a tariff has been suspended by order of the Commission, no further pleadings are necessary. Notice of the date and place of hearing is furnished all of those who have filed protests. When an Investigation and Suspension case is called for hearing any person may become a party to the proceeding simply by entering an appearance. No petitions of intervention are necessary. The proceeding is in most respects equivalent to an investigation by the Commission upon its own motion, although instigated originally upon protests received from interested shippers.^②

Forms of Trial of Formal Cases. In the Youngstown Pipe & Supply Co. Case the suspension feature was avoided. Mr. Whitney must now elect the mode in which the case should be tried on the formal docket. There are three forms from which he may choose:

1. Shortened procedure.
2. Modified procedure.
3. Formal hearing.

Shortened Procedure. When the complaint was filed, Mr. Whitney expected that the case would require a formal hearing. However, after "the issue was joined" the Commission's Chief of the Bureau of Formal Cases, the Chief Examiner, or some other person to whom the task was assigned, makes a careful study of the complaint, the answers, and the interventions. He is of the opinion that the case is such that it might properly be presented under the shortened procedure. Therefore, a

^① Rule XIX.

^② Further information concerning I. & S. cases appears in the preceding texts entitled GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION.

letter is written to the complainant and the defendants asking them to state whether they consent to have the case determined under that mode of procedure.^①

Assuming that all of the parties agree to the shortened procedure method each complainant first submits a memorandum of facts, together with an argument in support thereof. As required by Rule 10-A this memorandum is submitted to the Commission within twenty days after the date of notice that the shortened procedure is to be followed, and all facts submitted in the memorandum are sworn to. A sufficient number of copies are prepared so that there may be three copies for the use of the Commission and one for each defendant intervenor. Service is made by the Commission and the defendants are allowed thirty days for reply. Each complainant next submits a rebuttal memorandum, and the record is closed. A proposed report is then prepared by an examiner of the Commission and served upon the parties. After the record is closed the same procedure is followed as if the case had been tried in formal hearing, namely, exceptions may be filed, and oral argument may be had before the Commission, or a division thereof, in Washington.

In the case of the Youngstown Pipe & Supply Co., it is assumed that the defendants object to trial under the shortened form of procedure and so notify the Commission. Acceptance of this form of trial on the part of complainants and defendants is purely voluntary and if not desired, it may be refused.

Modified Procedure. The modified procedure is designed for a class of cases intermediate to the simpler ones tried under the shortened procedure, and the large, complex, and very difficult ones, which can be handled satisfactorily only in formal hearings.

^① Rule X-A of the Rules of Practice gives a definite outline, with full instructions, of each step in the shortened procedure, and Appendix 1 of the Rules of Practice contains a list of data illustrative of what should be included in the complainant's "memorandum of facts."

When the defendants object to the submission of this case under the shortened procedure, the Commission writes to the parties asking if they are disposed to employ the modified procedure.

The purpose of the modified procedure is to provide a middle course, wherein exhibits and statements of facts may be submitted preliminary to a formal hearing, in order to conserve time and money and to limit the hearing to those matters which cannot be agreed upon prior to the hearing. In this respect it is a hybrid, a cross between the shortened procedure and formal hearing methods of trial.

STEPS IN MODIFIED PROCEDURE. Under this method of trying an Interstate Commerce Commission case the first step is the complainants' filing, with the Commission and service upon the counsel for defendants and interveners, of a complete statement of facts relied upon, with copies of all exhibits. The defendants then file like statements and exhibits within thirty days.

. Next the examiner issues a "memorandum" of (1) the points agreed upon; (2) the points agreed upon in part; and (3) the points of disagreement. Within thirty days the parties may file written agreements upon the facts filed.

The case is then set for formal hearing upon the facts which are still in dispute. The agreed facts are made a part of the record and the parties are urged to argue the case before the examiner.

This form of procedure which is comparatively new and has been employed in only a few cases, was not adopted in the Youngstown Pipe & Supply Co. Case.

Formal Hearing. The procedure followed in conducting a formal hearing, the form decided upon in the case under discussion, is described in detail in the following chapter.

PRACTICAL APPLICATION

Problem. In filing the formal complaint what facts should be stated to show that the Youngstown Pipe & Supply Co. is the real party in interest and the one entitled to the reparation claimed? *

Solution. The complaint of the Youngstown Pipe & Supply Co. should show that the shipments were made f.o.b. Milwaukee; that the charges were paid by the complainant at the point of origin, that the price made by the complainant to the consignee was based upon Milwaukee delivery; and that no part of these transportation charges, as such, were paid back to him by the consignee.

Chapter IV

THE FORMAL HEARING

IN THE Youngstown Pipe & Supply Co. Case, the parties advise the Commission that there are not many facts in dispute; that the record will be short; and that they do not feel that the modified procedure, described in the preceding chapter, is especially adapted to this particular case. After this has been done they must wait until the Commission issues a notice of the time and place of the formal hearing. This notice will, in all probability, specify the name of the examiner or commissioner who is assigned to conduct the hearing.

Notice of Time and Place. The Commission's notice of the time and place of hearing is served upon the parties in a formal manner. Copies are mailed to the complainants and interveners, but are actually served upon certain agents of the various carriers especially designated for that purpose.^①

Place of Hearing. It is the policy of the Commission to select a place of hearing convenient and satisfactory to the original complainants, provided suitable accommodations are available at some such point. Ordinarily the Commission makes arrangements with the custodians of Federal court rooms in the city where complainant's place of business is located or as near thereto as practicable. This matter is entirely within the jurisdiction of the Commission but if the complainant has a preference there is no reason why he should not indicate the city in which he would like to have the hearing held.

If a court room is not available in the complainant's home town, he may be able, through the local chamber of

^① Rules of Practice, Rule III (h).

commerce or other body, to offer some public place, such as a city council chamber, or a convention room in a hotel, which is suitable for the purpose. The Commission is glad to receive offers of this kind and frequently avails itself of them.

Date of Hearing. The date of the hearing is selected so as to fit into the itinerary of one of the examiners, which may include from five to fifteen cities, and from twenty to forty cases. The Commission attempts to keep down the travel expense of examiners as much as possible without violating the policy of accommodating the complainant, where it is reasonable and not extravagant to do so.

Mr. Whitney receives a notice that the case of Youngstown Pipe & Supply Co. v. Pennsylvania R. R. Co., et al., No. 18597, is assigned for hearing before Examiner Blanck at 10 o'clock, standard time, Wednesday, April 4, 1928, in the United States courtroom No. 2, Federal Building, Youngstown, Ohio. Mr. Brown, Mr. Moody, and Mr. Whitney, the railroad representatives, and the interveners assemble in this courtroom a few minutes prior to the appointed time and arrange their papers so as to make a prompt start in the introduction of testimony.

Opening of the Hearing. The Commission's examiner, Mr. Blanck, calls the hearing to order and announces the title of the case. As two cases are set for the same day and place of hearing, the examiner announces that the Youngstown Pipe & Supply Co. Case will be taken up first. He then calls for the appearances.

Appearances. Mr. Whitney rises, gives his name, and states that he appears for the Youngstown Pipe & Supply Co., the complainant. The counsel for the defendants then state orally for whom they appear. The attorney representing the Laughlin Steel Company, interveners, then states his name, George L. Millman, and for whom he appears.

Even though no one appears for the defendants the complainant must proceed to make out his case. If this were an Investigation & Suspension case, the procedure would be different. In such cases, under the Commission's rules, the carriers, called respondents, must proceed first, and if they do not appear, the hearing is immediately closed and later the Commission enters an order requiring the cancellation of the schedules bearing the proposed changes.

Appearance Blanks. At the hearing the official reporter of the Commission distributes appearance blanks on which space is provided for the parties to order copies of the transcript of testimony direct from the official reporting firm. After the blanks are filled in they are returned to the official reporter and subsequently they are filed in the docket for permanent record of the case in Washington.

Free Copies of the Transcript. The Commission furnishes two free copies of the transcript of testimony, and the examiner usually announces, at the beginning or the end of the hearing, to whom the free copies will be sent. In the Youngstown Pipe & Supply Co. Case, Mr. Whitney will get the free copy for the complainant, and the carriers' attorneys, if a number are present, will agree among themselves as to which one shall get the free copy for the defendants. If they are unable to agree, the examiner will decide, probably in favor of the Pennsylvania, because it is a party to both of the routes.

Statement of Issues. The examiner then reads a brief and carefully prepared general statement of the fundamental issues of the complaint. Should the statement be incorrect the counsel for the different parties will point out what corrections should be made. The examiner gives the parties ample opportunity to do this.

Interventions. The Laughlin Steel Company's representative, Mr. Millman, then calls attention to his intervening petition. If his petition was filed prior to the hearing, and granted by the Commission, either he or the examiner announces this fact. In the event that his petition of intervention was not filed prior to the hearing, Mr. Millman supplies the necessary copies to all counsel who have appeared in the case. After reading the petition (silently) the examiner either announces that it is received or reserves his opinion until he has had time to review it more carefully. If the petition contains some paragraphs which tend to "unduly broaden" the issues, the examiner may order that paragraph stricken out and then grant the petition as amended. Petitions of other interveners, if there are any, are treated in like manner.

Motions. Any special motions which are to be made follow the filing of the petitions of intervention. This affords the carriers' representatives an opportunity to demonstrate their mastery of the facts and conditions surrounding the particular point or points in issue; the evidentiary value of the proof adduced; and the technique of procedure before the Commission. For example, had the case involved an allegation of undue prejudice, the carrier's representative, who had made a study of the Commission's findings in similar cases, might have filed a motion to strike this allegation on the ground that the complaint had not specifically set forth the nature and extent of the alleged undue prejudice, in such a manner as to put the defendants upon notice of the issue which they would have to meet, and that the complaint is defective in this respect in that it fails to comply with the Commission's Rules of Practice.^① The examiner would exercise his discretion in permitting, or not permitting, argument upon a motion of this kind.

In this instance Mr. Whitney might argue that the defendants should have filed their motion with the Com-

^① Rule III (m).

mission and, in the event that the examiner granted this motion, Mr. Whitney might move that he be permitted to amend the complaint at the hearing.

Subpoenas. Ordinarily no difficulty is experienced in securing the attendance of the necessary witnesses at hearings conducted by the Commission. As a general rule the policy of the carriers is to accede to every reasonable request for information contained in their records and for the attendance of their employes.

Production of Books and Documents. If the Youngstown Pipe & Supply Co. desires to have books and papers produced from the carriers' files, an application should be filed with the Commission for a *subpoena duces tecum*, well in advance of the hearing. This application must be verified; or sworn to; must specify the books, papers, or documents desired and the facts to be proved by them; and must state how these records will "be of service in the determination of the proceeding."^①

Fees. Fees for witnesses subpoenaed by the Youngstown Pipe & Supply Co., must be paid by them, as the Commission's rules require that this be done by the party applying for the subpoena.^②

Application for and Service of Subpoenas. During the course of the hearing, one or another of the parties may find it necessary to ask for a subpoena. This may be secured by making oral application to the examiner who has copies of signed subpoenas in his possession and can issue them immediately whenever good cause is shown.

There is no fixed machinery for the service of subpoenas issued on oral request at the hearing. Ordinarily the party applying for it must serve it personally and make the return to the examiner.

The only probable occasion for a subpoena in the pres-

^① Rule XII (b).
^② Rule XIII (c).

ent case would be in the event the defendants failed to put in sufficient evidence to show which of them was responsible for the alleged misrouting. If the necessary information is not furnished, Mr. Whitney may have to subpoena the agents who made out the waybills for these shipments in order to fix the responsibility for the misrouting. However, as is ordinarily the case, the carriers agree to furnish this information by a supplemental exhibit rather than go through the formality of having a subpoena issued. It can readily be appreciated that the waybills are the best evidence in misrouting cases, and since they are strictly within the sole knowledge and possession of the carriers, the complainant is entitled to have this evidence produced. Moreover, the Commission is given the necessary power under the Act to compel the introduction of evidence of this character.

Opening Statements. Opening statements by counsel, concerning the nature and extent of the evidence which they expect to produce, are generally dispensed with. In this case no opening statements are necessary.

Oral Evidence. The examiner now directs Mr. Whitney to call his witnesses, and present his evidence. Mr. Whitney then calls Mr. Moody to the stand and gives his name. The examiner administers the oath while the witness stands erect with his right hand raised above his shoulder, palm outward. The witness then takes his seat. Each succeeding witness is sworn in like manner.

Examining Witnesses. Mr. Whitney then asks the witness questions and the witness frames his replies in as direct, brief, and courteous a manner as possible, endeavoring to make his voice strong and his enunciation clear. He keeps his head turned toward the examiner and the official shorthand reporter. Mr. Whitney and Mr. Moody take particular pains to avoid letting their questions and answers overlap. They make certain that each question is complete before the answer begins and

that the answer is complete before the next question is asked.

The custom of having the questions and answers written out beforehand, and a copy passed to the official reporter at the hearing, is steadily gaining favor in cases before the Commission. While this practice would be ruled out in court it is encouraged by the Commission as it unquestionably shortens the records and makes them clearer and more intelligible. Moreover, it is particularly well adapted to the testimony concerning rates, tariffs, and distances, all of which can be checked from the Commission's files and from the defendants' own records.

The evidence presented by Mr. Moody covers the following points: His name, age, address, occupation, and experience in traffic matters; testimony relating to the rates charged, including their tariff authority, the rates sought, and a description of the routes, with distances. He offers for inspection the details of the shipments, in exhibit form, and the details of the bills of lading and freight bills; likewise rate exhibits showing comparisons of rates, revenues per ton-mile, per car-mile, and per car, average loadings, and average values per car-load. His testimony also covers the extent of loss and damage claims and the methods of handling, packing, shipping, and the like.^①

Cross-Examination. The defendants' attorney then proceeds to cross-examine Mr. Moody. The extent of this cross-examination depends largely upon the personal inclination of the attorney.

Mr. Moody endeavors to preserve a calm and fair attitude towards the questions propounded by the opposing counsel and to make all of his answers brief, direct, and courteous. Should he get ruffled and begin to display hostility he would be admonished by the examiner. He knows, from experience, that any attempt to spar and

^① See also the earlier manuals entitled GROUNDS OF PROOF AND PROCEDURE BEFORE THE COMMISSION.

evade giving direct answers would be readily apparent to all counsel present and to the examiner. Likewise, that a firm determination on the part of a witness to answer straight and direct from the shoulder on cross-examination creates a very favorable impression on a judge or counsel. If the witness is afraid to disclose the "whole truth," as required by the oath which he has taken, he weakens his case and the effect of all the testimony which he gives.

Limitation on Cross-Examination. Cross-examination is usually limited to matters testified to in the witness's direct examination. However, there are exceptions to this rule, the principal one being in regard to matters peculiarly within the knowledge of the witness. The trial examiner may exercise his own discretion with regard to the extent of the cross-examination permitted.

OBJECTIONS. Whenever, in the opinion of the counsel on either side, a question asked on cross-examination is irrelevant, immaterial, or otherwise improper, it is in order for him to make a formal objection, stating the legal ground for his objection. If the examiner is in doubt as to the purpose of the question, he will probably inquire of the counsel, and, on the basis of the objection, may ask that the argument be stricken from the official record. Whatever his ruling is, it is not open to debate and both parties should acquiesce in it. If the counsel considers that there is error in the ruling, he should respectfully and courteously ask that an exception be noted on the record.

Such exceptions to rulings made by examiners are seldom necessary. The examiners are nearly always well informed upon Commission practice and seldom fail to rule fairly and with good judgment. Apparently, the Commission's policy has been to treat technical objections not too seriously. Ordinarily the examiners may resolve a doubt by letting the question and answer go into the

record in order that each side may be precluded from claiming that it did not have a "full hearing." It would be difficult to find a case in which the courts had set aside an order of the Commission on the ground that certain evidence had been admitted over a valid objection. However, the Commission has been required to reopen cases in which the parties were "denied full hearing."

Counsel experienced in court practice are ordinarily too free with their objections in a case tried before an examiner of the Commission. From experience in this line of work they will learn that many of the technical rules of evidence are brushed aside in the trial of rate cases. Familiarity with Commission practice will teach them the futility of urging frequent technical objections. Objections which are conservatively made for the purpose of keeping down the size of the record and keeping out immaterial matter are helpful to the Commission, but tactical objections, made for the purpose of confusing the witness or beclouding the facts, never help the side of the counsel making them.

Counsel before the Commission should never cross-examine at all if the direct testimony is immaterial, and never ask a question on cross-examination unless certain that the answer which the witness will give is helpful to his client's case. When a traffic manager, or a lawyer, inexperienced in rate cases, attempts to cross-examine an experienced traffic witness for the carriers, he usually helps the carriers develop new angles of the defense. Rarely does cross-examination of a carrier's witness develop anything helpful to the shipper's case.

Redirect Examination. After the cross-examination of Mr. Moody is concluded Mr. Whitney may clear up, by further questions and answers, any points presented unfavorably or incompletely in the cross-examination.

Recross Examination. Ordinarily the examination does not go beyond redirect, but occasionally the defend-

ants may wish to ask further questions concerning matters developed in the redirect examination. Following this the witness is excused by the examiner, unless the examiner himself has questions which he desires to ask.

Other Testimony. Mr. Whitney then calls Mr. Brown, himself, to the stand. After he is sworn, his direct examination develops the following facts:

1. That he is the president of the corporation on whose behalf the complaint was filed.
2. That the corporation which he represents is engaged in the manufacturer of cast-iron pipe, at Youngstown, Ohio.
3. That he is personally familiar with the financial transactions concerning the shipments listed in the statement which is filed as a part of Mr. Moody's evidence.
4. That the pipe comprising these shipments was sold by the Youngstown Pipe, & Supply Co. to the consignee in Milwaukee.
5. That the contract of sale provided for delivery on cars at Milwaukee, freight prepaid.
6. That the Youngstown Pipe & Supply Co. prepaid the amount of the freight charges shown on the statement.
7. That the transportation charges were borne by the corporation he represents and that it has not been reimbursed in any manner by the consignee for the freight charges or any part thereof.

After the conclusion of Mr. Brown's direct testimony, an opportunity is given the defendants to cross-examine him. This may be followed by redirect and recross examination. The witness is then excused and counsel for him states that the complainant has concluded its evidence in chief, and has no other witnesses to offer.

The defendants then proceed in like manner with the introduction of their testimony through their witnesses. The complainant's counsel is given an opportunity to cross-examine each one in turn, as described above.

After the defendants rest their case, the complainant may introduce, in rebuttal, whatever testimony may be necessary.

Documentary Evidence. This outline of the procedure in introducing witnesses has not been complicated by discussions of technical rules of evidence. However, it may be well to insert at this point a very brief discussion of four cardinal rules of evidence, introductory to an explanation of Rule XIII of the Commission's Rules of Practice with respect to documentary evidence.

The preceding discussion of the hearing, and the method of producing witnesses, deals with only one branch of evidence, namely, oral evidence produced by means of witnesses in person. The other form of evidence, namely, documentary evidence, is no less important in practice before the Commission.

Rules of Evidence. The form and substance of exhibits which may be offered as evidence in documentary forms are explained and illustrated in another manual.^① Such exhibits, in order to be properly admissible, must conform to Rule XIII of the Rules of Practice and to the following four cardinal rules of evidence:

1. The evidence must correspond to the allegation and be confined to the issues.
2. The evidence is sufficient if the substance of the issue is proved.
3. The burden of proof of the allegation is on the party holding the affirmative of the issue. The burden is ordinarily upon the complainant in formal complaint cases, and upon the respondents in Investigation & Suspension cases. If the rates in issue have been increased since January 1, 1910, by changes other than the general increase of 1918 and 1920, the burden is upon the carrier.^②
4. The best evidence of which the case is susceptible must be produced.

^① PREPARATION OF RATE CASES: GRAPHIC PRESENTATION OF RATE EXHIBITS AND EVIDENCE.

^② Interstate Commerce Act, Section 15.

In formal complaint cases, the best evidence of the transportation details consists of the bills of lading and paid freight bills. In reparation cases, such as the one of the Youngstown Pipe & Supply Co., these documents should be tendered in evidence as exhibits in connection with the oral testimony of Mr. Moody and Mr. Brown. The examiner may decide (a) to receive them when offered at the hearing; or (b) he may tell Mr. Whitney, the complainant's counsel, that the record will show that the shipping papers were offered for inspection at the hearing, but that these should be retained in complainant's possession. If the examiner so instructs Mr. Whitney, he will know that the reparation procedure will conform to that prescribed in Rule V of the Commission's Rules of Practice.

Statement of Shipments—Rule V. In substance, Rule V provides that if, after decision upon the main issues, the Commission decides that reparation should be awarded, the record will be held open while complainant prepares a *reparation statement* in conformity with Form No. 5 of the APPROVED FORMS, appended to the Rules of Practice. This statement is submitted to the defendants for check and verification, and then mailed to the Commission which enters an order of reparation, commanding the defendants to pay the proper amounts to the complainant. As Rule V sets out in detail the specific requirements of the Commission, further reference to them is not necessary. The statement filed in connection with the informal complaint of the Youngstown Pipe & Supply Co. contains practically the same information as is required in a Rule V statement.

Documentary Evidence—Rule XIII. As documentary evidence is frequently very valuable in Commission cases, Rule XIII is very important. Paragraph (a) of this rule provides that when relevant and material matter is embraced in a book, paper, or document containing other

matter, not material or relevant, the relevant portion must be designated plainly and true copies may be submitted in evidence as exhibits.

DOCUMENTS ON FILE WITH COMMISSION. Paragraph (b) provides that reports or documents on file with the Commission (not including freight tariffs) may be made a part of the record of facts without, as is required in the case of documents *not* on file with the Commission, producing the document or report for identification.

This paragraph also provides four methods in which relevant portions of the transcripts in other cases before the Commission may be made a part of the record. It states that when any portion of the record in another proceeding before the Commission is offered in evidence, a true copy of such portion shall be offered as an exhibit, but that this provision may be waived, subject to four conditions, as follows:

1. If the party offering the evidence agrees to supply the necessary copies later at his own expense, if and when required.
2. If the portion is specified in detail so as to be readily identified.
3. If the parties represented stipulate that such portion of the other transcript may be incorporated in the record by specific reference, and that other parties may incorporate other portions, in a similar manner.
4. If the examiner directs such incorporation.

Evidence offered in any of these forms is subject to proper objections.

Paragraph (d) requires that copies of all documentary evidence must be furnished to the opposing counsel. It is, therefore, desirable to have a supply of all exhibits on hand in order that each participant in the hearing may have a copy.

TARIFF SCHEDULES. Paragraph (c) of Rule XIII is an important exception to the rules for the submission of documentary evidence in favor of tariff schedules on file

with the Commission under the provisions of Section 6 of the Interstate Commerce Act. It provides that matter contained in any such tariff or schedule need not be produced for identification, or produced bodily in the form of exhibits. Specific reference to the number, page, and item of the tariff or schedule in question is all that is required. Exhibits of rates and rate comparisons, however, must contain upon their face specific references to all of the tariffs in which the individual rates appear. Where distances are shown on the exhibit there must be footnotes showing how the distances are arrived at, that is, the various lines and their junction points must be specified briefly.

OTHER PROVISIONS OF RULE XIII. Paragraph (e) gives the specifications for printing and typewriting the exhibits. For example, it states that the preferred size is 12½ by 22 inches, with a side margin of at least 1½ inches; and further that exhibits of more than five pages should have a summary sheet attached as the first sheet or title-page. Blue prints and hectograph work are frowned upon by the Commission. No case is helped by the introduction of unwieldly or poorly printed material.

Paragraph (f) provides for the filing of supplemental exhibits subsequent to the hearing.

Paragraph (g) provides that no facts which are submitted subsequent to the hearing, except authorized supplemental exhibits, will be made a part of the record.

Numbering Exhibits. When documentary evidence is submitted in the form of exhibits the examiner gives them consecutive serial numbers in the order in which they are offered. For this reason it is unwise for Mr. Moody, in preparing his exhibits, to insert numbers on their face. In case one exhibit is rejected, or in case an exhibit is placed in the record ahead of his, the entire series of his exhibit numbers will be thrown off. This occurs frequently.

Submitting Exhibits. When the exhibit is offered two copies are handed to the Commission's shorthand reporter who marks the original for identification. The first copy is handed to the examiner for his personal use. After the reporter marks the original it becomes the official record of the Commission and can be removed under no circumstances. Care should be taken by witnesses not to disturb the official file of exhibits which are in the reporter's possession.

PRACTICAL APPLICATION

Problem. Mr. Brown is called to take the stand and his attorney is directly examining him. What facts should be developed in this direct examination?

Solution. Mr. Brown should be questioned along lines that will bring out the following facts:

That he is the president of the corporation on whose behalf the complaint is filed.

That the corporation is engaged in the manufacture of cast-iron pipe at Youngstown, Ohio.

That he is familiar with the financial transactions concerning these shipments.

That the pipe was sold by him to the consignee in Milwaukee.

That contract of sale provided for delivery at Milwaukee, freight prepaid.

That the Youngstown Pipe & Supply Co. prepaid the amount of the freight charges shown on the statement.

That the transportation charges were borne by the Youngstown Pipe & Supply Co. and that it has not been reimbursed in any manner by the consignee for the freight charges or any part thereof.

Chapter V

ORAL ARGUMENT AND BRIEFS

WHEN the taking of testimony is concluded, the examiner hears oral argument, if this is desired by the parties; fixes the dates for the filing of briefs; announces the names of the parties to whom the free copies of the record will be sent, unless this was done at the beginning of the hearing; and formally closes the hearing.

Requests for Oral Argument before Commission. If Mr. Brown thinks that the future shipments of the Youngstown Pipe & Supply Co. justify the expenditure necessary to have the case argued before the Commission in Washington, his representative, Mr. Whitney, can place the request upon the record at the conclusion of the hearing, or it may be made later in the brief or in the exceptions to the proposed report.^①

The Commission's argument calendar is crowded with cases of importance to entire communities and to large sections of the country. Consequently, requests for oral argument before the Commission in Washington should not be made unless necessary. However, even though the complainant may not deem argument necessary at the close of the hearing, the proposed report of the examiner, if adverse to him, may render it imperative that his arguments be put before the Commissioners who are going to decide the case. Oral argument before them is the only direct contact between the complainant and those who pass upon the merits of his case. If Mr. Whitney and Mr. Brown have decided to have the case argued in Washington, the request might as well be made at the

^① Rule XIV, (d-4) and (e).

hearing. If they have decided otherwise, there will still be considerable time in which they may change their minds, if necessary.

Oral Argument before Examiner. In cases such as the one of the Youngstown Pipe & Supply Co., the amount involved would hardly justify sending Mr. Whitney to Washington to argue the case before the Commission, and yet the record should show the principal contentions upon which the complainant relies. In that event, the counsel may request that the examiner allow oral argument before him and indicate the amount of time which would be required for the complainant's argument. The examiner will then arrange the argument and allot the time for the opening, reply, and closing for the several parties.^①

The argument which Mr. Whitney presents for the complainant embodies the following, in about the order indicated:

1. A statement as to the two primary issues of unreasonableness and misrouting, upon which the complaint is founded.
2. A summary of the situation, consisting of a description of the two routes, the distance, and the present rates over each route.
3. The evidence with respect to the issue of misrouting, namely: the fact that the shipment was tendered un-routed; that the carriers forwarded the shipment over a higher rated route; that the lower rate applied over an available route in which the originating carrier also participated; that these facts constitute misrouting under the Commission's decisions.
4. A statement that the car ferry from Ludington to Milwaukee is not a water line within the meaning of the Commission's decisions with respect to misrouting, but a part of the rail line of the Pere Marquette.
5. A summary of the evidence bearing upon the reasonableness of the rate charged over the route of movement.

^① Rule XIV (d-1).

- 6: In conclusion, a renewal of the prayers of the complaint, namely, reparation under both allegations, and that a reasonable rate be prescribed for the future over the route through Chicago to Milwaukee.

The defendant carriers are nearly always represented by experienced counsel and it would be unnecessary to include, here, an outline of their argument. The complainant should reserve a short time for reply to the defendants' argument.

Fixing Due Date for Briefs. The printed brief, especially when cases are not argued before the examiner, is the best means of summarizing the facts and contentions for the benefit of the examiner who is charged with the duty of writing a proposed report. There are very few cases in which well-written briefs from all parties are not an important feature of the record.

At the hearing, Mr. Whitney requests that the dates be set for briefs and the examiner complies by allowing thirty days from the last day of the hearing for the filing of briefs by all parties. In case Mr. Whitney has engagements which prevent his preparing a brief, having it printed, and sent to Washington within that time, he should make a request for an extension of the brief date.

Ordinarily such a request will be granted in a formal complaint case, but not in an Investigation & Suspension case. The period within which I. & S. cases must be decided is only seven months and this is not sufficient to allow more than thirty days' time for briefs. If, in an I. & S. case, the carriers need additional time and request an extension of the thirty-day period, they will agree to file a Sixth Section application with the Commission, asking authority to postpone the effective date of the suspended schedule in order to give time for a thorough presentation of the case.

Ordinarily no reply briefs are permitted in cases presented under the "proposed report" plan, but in excep-

tional cases this rule may be relaxed for good cause. Requests for reply briefs should state the good cause fully and pointedly. After the brief date is fixed the examiner announces that the hearing is closed.

Briefs. Too much emphasis cannot be placed upon the importance of filing a carefully prepared brief. This is an art in itself.

It is a fact that many of the briefs filed with the Commission are of little or no help or assistance to the Commission. The reason is that there are comparatively few lawyers in the country who know how to present a case upon brief in the manner that the Commission finds most helpful.

The carriers realize that the brief is the most important single document filed in the record of a case. They designate, for this phase of the case, one of their lawyers who, by special training and experience, has earned an unusual reputation as a writer of strong, clear briefs. In the Youngstown Pipe & Supply Co. Case, Mr. Whitney should by all means write the briefs, as lawyers are trained in that form of literary composition. However, while it would be inadvisable for Mr. Moody to attempt to prepare the brief himself he can, because of his traffic knowledge, render valuable assistance.

Briefs must be received by the Commission within the thirty-day period, or on or before the date fixed at the conclusion of the hearing, unless an extension of the date has been granted. If not filed strictly within the required time they will be rejected and returned.

Structure of the Complainant's Brief. The Rules of Practice contain certain exacting requirements for the printing and filing of briefs, and also describe the subjects that should be included and discussed in the briefs.^① As Mr. Whitney is aware that his unfamiliarity with work in this field is a handicap, he asks a friend of his

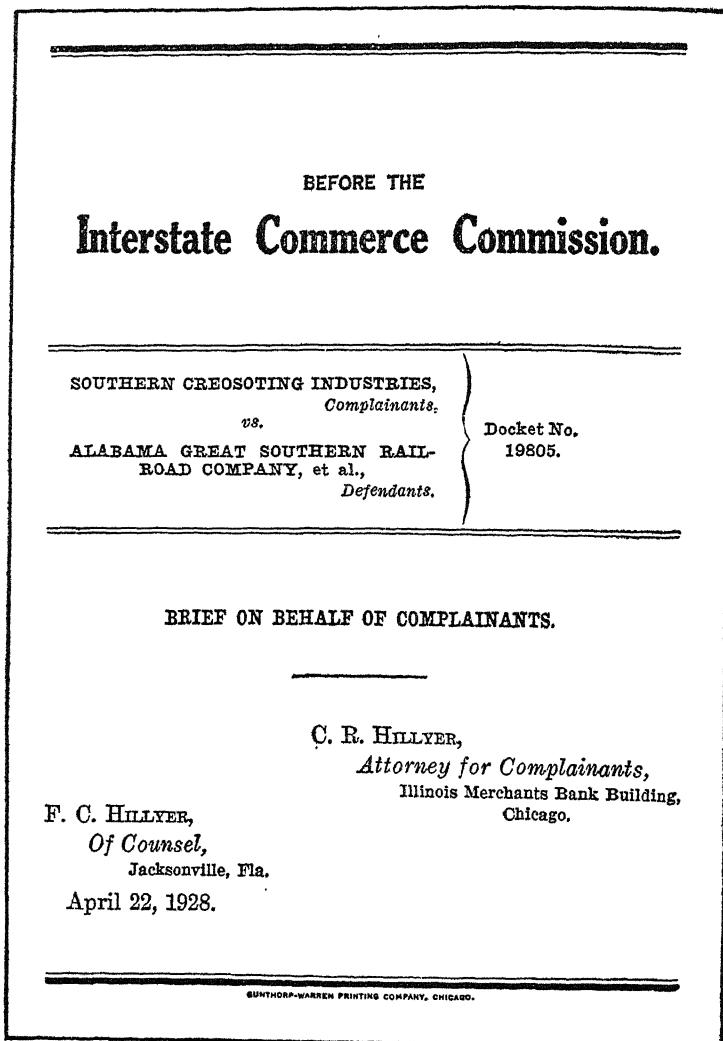


Figure 1. Title-page of a brief, properly prepared. who is a commerce counsel to outline, for him, the more important points to be observed in drafting this brief. Accordingly, he receives the following memorandum:

Cover Page. The cover of the brief shows the name of complainant, "v.," and the name of the principal defendant, "et al." Opposite this is the I. C. C. docket number as shown below:

YOUNGSTOWN PIPE & SUPPLY CO.,
v.
PENNSYLVANIA RAILROAD COMPANY, et al.,
Complainant, }
Defendants. } Docket No.
18597

Then follow the names of the complainant's counsel and/or traffic manager, on the right-hand side. On the lower left side the date of the brief is shown together with the address at which it is prepared.

Index. The first page or pages contain an index of the main topics and subheadings of the contents of the brief.

List of Cases. The index is followed by an alphabetical list of the cases or decisions cited in the brief, with the numbers of the pages on which the citations appear in the brief.

Body of the Brief. On the next page the title, as shown on the cover, is repeated. Here the body of the brief, comprising four main divisions, starts:

1. Statement of the case.
2. Abstract of the evidence.
3. Argument.
4. Request for specific findings and conclusions.

STATEMENT OF THE CASE. The first paragraph contains a clear, concise, and condensed statement of the main issues in the case, which is similar to the statement read by the examiner at the opening of the hearing. A page or two is sufficient for this statement. A paragraph should be added showing where and when the case was heard, and the name of the examiner or Commissioner who conducted the hearing.

ABSTRACT OF THE EVIDENCE. The abstract of the evidence presented may be made under subject headings,

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Hydraulic-Pre
Increased Sw

...
Lake Charles
Limestone fr
McLeod Case
Mississippi Fe
Missouri & I.I
Peabody Lum
Southern Hat
Southern Ric
Strasburg Ste
Strasburg Ste
Swift & Co

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Figure 2. To comply with Rule XIV (b) of the Commission's Rules of Practice, every brief of more than twenty pages must contain a subject index and an alphabetically arranged table of cases cited.

or in the form of a running outline of the testimony, in the same order as it appears in the record. The testimony should be abstracted in the first person and in an abbreviated form, omitting questions unless the questions form the real basis of the answers.

Each statement of fact should be accompanied by a page reference to the transcript of record. For example, "I am Traffic Manager for Youngstown Pipe & Supply Co., and I am familiar with the rates under attack and have prepared an exhibit which I now offer (Rec. p. 3-5)."

All of the essential facts that are necessary to support the allegations of the complaint should be included in the abstract and all nonessentials should be omitted. The length of this second division of the brief depends entirely upon the number of witnesses and the amount of their testimony.

The abstract should give a short description of each exhibit. One or two of the most convincing exhibits showing tabulations of rates and distances should also be printed at the conclusion of the abstract. Such exhibits can be referred to at the oral argument, at which time the Commissioners are eager to have such a statement before them.

ARGUMENT. The argument in the brief states, first, the primary allegation (in the Youngstown Pipe & Supply Co. Case unreasonableness) followed by a summary of the convincing evidence in support of that allegation, and fortified by citations from decisions of the Commission or the courts, in support of the principle presented.

The second primary allegation is next stated (in the Youngstown Pipe & Supply Co. Case misrouting) followed in like manner by facts, reasoning, and citations in support of the principle relied upon. Then the prayer for reparation and the extent of the relief sought is stated, with the facts showing that the complainant is the real

party in interest. This is followed by reasoning and citations in support of awards under the two primary allegations.

Next, the prayer for future rates is stated, together with the reasons why this form of relief is sought.

The argument in the brief must be on the point at all times, and must employ direct and forceful language. The filing of a wordy brief before the Commission is an expensive and useless effort.

REQUEST FOR SPECIFIC FINDINGS AND CONCLUSIONS. In this fourth and final division the findings sought by the complainant and the form in which they are desired are concisely listed. For example, in the Youngstown Pipe & Supply Co. Case there would be a request for findings that:

1. The rates over the route of movement were unjust and unreasonable.
2. The shipments described in the evidence were misrouted.
3. The present rates over the route through Chicago are and for the future will be unjust and unreasonable to the extent that they exceed, or may exceed, 40 cents per 100 pounds.
4. An order be entered prescribing the rate of 40 cents on cast-iron pipe from Youngstown to Milwaukee, via the Pennsylvania and the Chicago and North Western, for the future.
5. The complainant made the shipments as described; paid and bore the charges thereon; has been damaged by the misrouting and by having paid unreasonable rates, and is entitled to reparation in a specified sum, with interest.
6. An order be entered requiring defendants to pay to complainant the said sum, with interest at 6 per cent per annum, from the date of payment of the unreasonable charges.
7. The Commission grant such further relief as, in the premises, it may deem proper.

All of the above specific statements are made in connection with the Youngstown Pipe & Supply Co. Case.

For all usual cases, the general outline of the brief is practically the same as this one, and it is important that it be followed.

Printing Specifications. The Commission requires briefs to be printed in ten or twelve point type on good, unglazed paper, $5\frac{7}{8}$ inches wide by 9 inches long, with inside margin not less than $1\frac{1}{2}$ inches wide, and with double-leaded text and single-leaded citations.^① Accordingly, when Mr. Whitney completes his draft of the brief he copies these specifications and sends them along with his draft to the printer.

In cases of undue prejudice a map or chart of the locations of the alleged preferred and prejudiced localities must be included in the brief. This, however, is not necessary in the Youngstown Pipe & Supply Co. Case.

Service. The Commission requires twenty copies of the brief mailed to them and the letter of transmittal must show that additional copies have been mailed to all parties and their attorneys who appeared at the hearing.^②

PRACTICAL APPLICATION

Problem. Assuming that the Youngstown Pipe & Supply Co. expects to have a continuous and large movement of cast-iron pipe from Youngstown, Ohio, to Milwaukee, Wis., and therefore considers it worth while to have this case argued before the commission in Washington, what action would be necessary to arrange for such a hearing?

Solution. This might be accomplished by placing a request for oral argument before the Commission in Washington, on the record at the close of the hearing. On the other hand, if such a request is not made at the close of the hearing by the examiner, but subsequently appears desirable, as for example if the report of the examiner proves adverse to the complainant, such request for hearing before the Commission in Washington may be made later in the brief or in the exceptions to the proposed report.

^① Rule XXI.

^② Rule XIV (c).

Chapter VI

CONCLUDING THE CASE

AFTER the briefs have been received by the Commission the examiner in charge of the hearing brings forward a proposed report. This report, which is in the form of a decision of the Commission, is the recommendation of the examiner. It contains a statement of the issues and facts in the case and the findings and conclusions which the examiner thinks should be made.^①

Structure and Preparation of the Proposed Report. In the Youngstown Pipe & Supply Co. Case the proposed report of the examiner includes the following subject matter:

A statement of the issues, similar to the one the examiner read at the opening of the hearing.

A statement of the route of movement and the route specified in the bills of lading; the rates over the two routes; the rates charged; the rates legally applicable; the facts bearing upon the allegation of misrouting.

An analysis of the complainant's allegation with respect to misrouting and the turning point in the evidence, followed by a finding that the shipment was misrouted by the carriers.

A statement of the complainant's allegation of unreasonableness; a brief summary of the essential facts in support of this issue; a summary of the evidence offered by defendants indicating that the rates charged were not unreasonable *per se*.

A discussion of the existence or absence of necessity for the maintenance of the rate sought over the Chicago route for the future, with his finding that, the route in connection with the Pere Marquette being open, the record failed to show the necessity for an additional route through the congested Chicago switching district.

The conclusions: That the shipments were misrouted; that the

^① Rule XIV (d-3).

rates assailed are not unreasonable; that reparation should be awarded; that the prayer for the future rate via the Chicago gateway should be denied.

As a rule the proposed reports issued by the Commission's corps of able examiners are carefully prepared in a uniform style. Much of the detailed evidence is not included in the proposed report, and seldom do the examiners set out in the form of a discussion, the exact method of arriving at their conclusions. This is due to the nature of a freight-rate case and the very many details which go to make up one's conclusion upon the entire record.

In a large percentage of cases the Commission adopts substantially all of the examiner's report and substantially the same general findings or conclusions. For this reason counsel for both complainants and defendants must study the proposed report most minutely. If any *errors of fact* or, in the opinion of the several parties, *errors of judgment*, appear to have been made by the examiner, they should not hesitate to bring their views upon the proposed report to the Commission's attention in a concise and respectful way. An opportunity to do this is afforded by the Commission's rules providing for the filing of exceptions by the parties.

The Commission serves copies of the proposed report upon all parties who appeared at the hearing or are listed on brief. The report contains a stamp of the Commission showing the date upon which all exceptions to it must reach the Commission. The period allowed is generally twenty days.

Exceptions to the Examiner's Proposed Report. The Commission requires that exceptions to the proposed report of the examiner shall be specific.^① If the error is one of fact the exception must point out the statement in the proposed report to which exception is taken and follow this reference by quoting the correct fact from the

^① Rule XIV (d-5).

record and citing the page on which the evidence quoted appears. Unless exceptions concerning errors of fact or conclusions are filed, the Commission assumes that the proposed report is correct.

In the Youngstown Pipe & Supply Co. Case; for example, Mr. Whitney includes in the exceptions such errors of fact as may appear in the proposed report, and takes specific exception to the findings and conclusions with respect to the reasonableness of the rate and the necessity for the route by way of Chicago. As to misrouting and the award of reparation, the exceptions which he files merely state that those findings are satisfactory to the complainant.

The defendants take exception to the finding that the shipments were misrouted and to the award of reparation, but accept as correct the finding that, in the examiner's opinion, the rates assailed over the Chicago route were not unreasonable. They also state that they concur in the finding with respect to the lack of necessity for the additional route by way of Chicago. After the exceptions are briefly stated a short argument, confined to the exceptions, is included.

Printing and Filing of Exceptions. As indicated by the Commission's stamp, exceptions to this proposed report must be filed within twenty days after it is served. They must be printed and served in the same manner as briefs. Accordingly, twenty copies are sent to the Commission, and one copy is sent direct to each of the parties represented at the hearing.

If oral argument before the Commission in Washington is desired, a request to this effect may be included at the end of the exceptions, even though no previous application has been made for it. Any party filing exceptions, or reply to exceptions, may apply for oral argument but the request must accompany the exceptions or reply.^①

^① Rule XIV (d-4).

Replies to Exceptions. After expiration of the twenty-day period for filing and service of the exceptions,^① ten days are allowed for the interested parties to file their replies to the exceptions. Such replies must conform to the same rules for printing and service as briefs and exceptions. It is always well for the party in whose favor the proposed report is rendered to support the examiner's report as adequately as possible by a carefully prepared reply.

Oral Argument before the Commission. If a request for oral argument is made by either party within the time allowed, the Commission ordinarily grants it and assigns a date on which counsel for the parties are to appear at the offices of the Commission in Washington. Usually the date ranges from one to three months from the time the replies to the exceptions are received. If the case is relatively unimportant, a Division of the Commission, composed of three members, is designated by the Commission to hear the argument and dispose of the case. If the issues involved in the case are of importance to the entire nation, or a large section of it, or to one of the basic industries, the argument is usually assigned to the entire Commission.

Notice of Oral Argument. The Commission serves notice of oral argument upon all counsel who have appeared at the hearing or whose names have appeared upon briefs and exceptions. No answer to this notice is required, but each counsel who desires to participate must write to the Commission requesting that he be allotted a certain length of time for his argument. In the Youngstown Pipe & Supply Co. Case, Mr. Whitney would probably be allowed about one-half to three-quarters of an hour. Counsel should never request an unnecessary length of time as the Commission's argument calendar is always crowded and its time must be con-

^① Rule XIV (d-4).

served to the utmost extent. Before the hearing each counsel can, by consulting the clerk in charge, ascertain how much time is allotted to him and can then shape his argument accordingly.

Hearing the Argument. Arguments before the entire Commission, or a Division of the Commission, are held in one of the large halls on the top floor of the Commission's headquarters in Washington.

After the Commissioners have entered the hall and taken their seats, the Chairman of the Division calls the name of the case and, from the list before him, announces the name of the first counsel who will participate in the oral argument. Three minutes before his allotted time expires a small red light flashes immediately in front of him. This signal is a warning for him to conclude his argument. The counsel who opens the argument may reserve some of his time for reply after his adversary has concluded.

As this phase of the procedure is the only step in which the litigants have an opportunity to plead their causes direct to the members of the Commission who will decide the issues, the folly of complainants or defendants permitting other than trained and seasoned lawyers, accustomed to legal debate and oral combat, to represent them is readily apparent. The importance of this opportunity should not be neglected or underestimated, especially in cases where the proposed report of the examiner is unfavorable.

Essentials of Opening Argument. The experienced counsel, in opening the argument, does not take for granted that the Commissioners before him are versed in the issues or the facts of his case, but opens his remarks with a simple and concise statement of the issues, similar to that contained in the first paragraph of the proposed report of the examiner. Next, he states the recommendations of the examiner, and specifies those that he is sup-

porting in argument, and those which he is seeking to have reversed or modified.

He follows this introduction with a brief statement of the geographical situation of the points of origin, destination, routes, and a statement of the rate charged, and the rates sought.

His argument proper follows the same general outline as that adopted in his brief, and in concluding, he renews, in the form of a summary, the prayers of the complaint. If the case is complex he may pass copies of certain exhibits and maps to the bench in order that the Commissioners may more readily absorb the essential details of the case.

If the counsel omits to present the primary issues and a brief picture of the case in the opening argument, he cannot expect to gain and hold the close attention of the Commissioners. It will prove to his advantage to bear in mind that—

A case well stated is a case half won.

As a general rule it requires both skill and experience to compass the high points in a case within the allotted time.

Substance of the Argument. The substance of the arguments of each counsel should be strictly confined to evidence of record and to arguments made in the written briefs and exceptions. A shorthand reporter takes the oral argument which becomes a part of the record in the case.

Decision of the Commission. Ordinarily the decision of the Commission is rendered and served upon the parties within three to nine months after the oral argument, depending upon the size and nature of the case. While the form and substance of the Commission's decision is usually the same as that of the proposed report of

the examiner, in many instances the conclusions proposed by the examiner are modified by the Commission.

Procedure for Reparation. The procedure generally ceases with the receipt of the decision, except for the matter of reparation. Assuming that, at the hearing in the Youngstown Pipe & Supply Co. Case, the examiner instructs the parties that reparation, if awarded, will be handled under Rule V procedure, and that the Commission, in its decision finds that the Youngstown Pipe and Supply Co. was damaged, the Commission then instructs the complainant to comply with Rule V of the Rules of Practice.

Immediately upon receiving the decision Mr. Moody prepares a statement of the shipments and the amounts of reparation claimed, as provided in Rule V. The statement is submitted to the proper officials of the carrier found responsible for the misrouting, for verification, and a certificate of correctness. This statement is then mailed to the Commission and the Commission, in due course, issues a specific order requiring the proper carrier to pay the complainant the amount of damages so determined, with interest.

Petitions for Rehearing or Reopening.^① In the meantime, the defendants in the Youngstown Pipe & Supply Co. Case, thinking that an error was made in the Commission's finding that the shipments were misrouted, may petition for rehearing, reargument, or reconsideration. In this event, their petition must be printed, filed and served in the same manner as required for briefs, except that only 15 copies are necessary for the Commission itself. Opportunity will then be given the opposing side to file a reply to the petition within ten days.

Unless this petition sets up new matter not fully considered by the Commission in its opinion, or alleges some

rather patent error of law, the Commission will deny it. However, the policy of the Commission toward such petitions might be described as liberal, certainly more liberal than that of the courts.

When a case has been decided by a Division of the Commission the petitions for rehearing are referred to the entire Commission. For this reason the granting of a petition is in the nature of an appellate review, by the full Commission, of the decision of a division. No party should invoke the action of the full Commission upon such a petition unless he has sound logic and reason upon his side. The mere fact that a case is decided adversely to one party or the other does not, in and of itself, warrant taking an appeal to the full Commission.

A petition for rehearing the part of any case which relates to reparation must be filed within sixty days after service of the report.^① If the petition of the carriers in the Youngstown Pipe & Supply Co. Case is filed after the expiration of that period the reply of the complainant should object upon that ground.

If a petition for rehearing or reopening is granted, the case will be set down again for rehearing, further hearing, further argument, or further consideration, according to the merits and prayers of the petition. After these subsequent proceedings have been concluded a new report on rehearing, further hearing, reargument, or further consideration will be issued by the entire Commission. If the petition for rehearing is denied, a formal notice to that effect will be served upon all the parties by the Commission and the litigation is ended so far as procedure before the Commission itself is concerned.

Actions in Court upon Interstate Commerce Commission's Orders. The scope of this text is confined to procedure before the Commission and therefore no attempt is made

^① Rule XV (e).

to go into procedure in the courts. However, the following brief sketch is essential to insure against leaving the reader in ignorance of possible further action.

There are two usual avenues through which the Commission's orders may be taken into a Federal court. In the Youngstown Pipe & Supply Co. Case, for example, the carriers may refuse to pay the damages awarded by the order of the Commission. The Interstate Commerce Act^① provides that in such a case the shipper may bring suit in the Federal district courts, based upon the Commission's report and award, which will be *prima facie* evidence of the facts therein made. As a rule the shipper can go into court only when an affirmative order of damages has been issued in his favor and the carriers refuse to obey the Commission's order.

If the Commission had found the rates unreasonable and had issued an affirmative order against the carriers, requiring them to establish and maintain for the future the rate of 40 cents via the Chicago route, they would have to pay heavy fines for failure to obey this order unless they obtained an injunction in a Federal court against its enforcement. The court having jurisdiction of such cases consists of three Federal judges specially created by the statute.

After a case has been tried in this court an appeal lies direct to the Supreme Court of the United States. The courts require the Commission to adhere strictly to the statute, and decisions of the Supreme Court upon contested orders of the Commission are final as to what the statute means and what the Commission shall do under it.

If the Commission dismisses the complaint, neither shipper nor carrier would have any cause of action in the courts. There are exceptions to these general statements but in ordinary cases these principles govern.

^① Section 16, paragraph (2).

CONCLUSION

The foregoing pages on procedure before the Interstate Commerce Commission are intended to give a simple, nontechnical account of the Commission's work and what is expected of one going before it for the purpose of moving that body to action under the terms of the Act.

Before a person is entitled to call himself a commerce lawyer, however, he has a long road to travel. Not only should he be well grounded in the law, in its broadest aspect, but he must keep up with the current work of the Commission through its published opinions and annual reports. Some knowledge of the history of transportation in general in the United States and other countries is exceedingly valuable and a considerable degree of familiarity with the opinions of the Commission and the annual reports of that body since it was instituted, is almost essential.

Nor is this all. Since the passage of the Act in 1887, there has been constant litigation under it in the Federal courts. The decisions in these cases which involve questions of constitutional, statutory, and administrative law bearing upon the powers of the Commission and the application of these laws to transportation problems, have a direct bearing upon the enforcement of the Act by the Commission and the rights of the various parties under the law.

It seems hardly necessary to add that the real outcome of a case depends, not so much upon the formal procedure in the trial of the case, as upon *the proof offered at the hearing* in substantiation of the complainant's

cause, and the skill with which the record is compiled by the parties. The evidence that should be offered in particular cases depends upon the facts peculiar to each case.

PRACTICAL APPLICATION

Problem. Mr. Whitney has received a copy of the proposed report in which the examiner recommends that the Commission find that the shipments were misrouted, but that the rates assailed are not unreasonable; that reparation should be awarded, but that the prayer for the future rate via the Chicago gateway should be denied. What should be his next step?

Solution. His next step should be to prepare and file exceptions to the proposed report, and, in addition, to point out any errors of fact that may appear, to take specific exception to the findings and conclusions with respect to the reasonableness of the rate and the necessity for the route by way of Chicago. He should also state that the finding of misrouting and award of reparation are satisfactory.

APPENDIX

With the exception of the Special Docket Application, all of the more important forms to which reference is made in this manual are shown in the Rules of Practice before the Commission.

The Special Docket Application, reproduced on the following pages, is the form used by carriers in complying with the requirements of Rule III (f) of the Commission's Rules of Practice, when seeking authority to refund charges collected in violation of the Interstate Commerce Act.

Interstate Commerce Commission

ORDER.

At a session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 4th day of August, A. D. 1920, it was ordered that applications on the Commission's special docket for authority to make reparation (except as to charges assessed by or through the President during Federal control) be made on the following form.

(SEAL.)

GEORGE B. McGINTY,
Secretary.

Notice.—Attention is directed to Conference Rule 394. This Commission will not ordinarily consider upon the special docket a claim for reparation unless the rate, rule, or regulation upon base of which adjustment is sought has been published and made applicable via the issue over which the claim moves.

Claims which are denied or declined by the Commission on the special docket may not be reconsidered on that docket if it is not again submitted within a period of six months from the date upon which it was denied, nor may it be filed as a formal complaint unless such formal complaint be filed within six months after the parties have been notified by the Commission that the claim can not be determined informally. For the time within which such claim may be filed for reparation, see Rule 394, and for the period of limitation set forth in section 16 of the Interstate Commerce Act and section 20b(f) of the Transportation Act, 1920. See Rule 311, Rules of Practice.

The requirements of this form must be complied with in every case.

SPECIAL DOCKET NO.

Complainant	Complainant's No.
	Co. Claim No.
	Co. Claim No.
	Co. Claim No.
Defendant	Request for authority to pay \$

TO THE INTERSTATE COMMERCE COMMISSION:

The Company respectfully requests an order herein authorizing the payment to the above-named claimant, of State of of the sum of Dollars (\$.....), as reparation in connection with the following shipment :

Commodity
Number of shipments aggregate weight

From (Point of origin) to (Destination) Reconsigned at
Consignor consignee

Bill of lading issued by (Use initials) Co., at
Date , 19 Shipment moved as follows:

Co., from to via
Co., from to via
Co., from to via

Aggregate freight charges actually collected, \$ date paid, 19

By whom paid to carrier Date of delivery 19

Give reference to previous cases which involved the same rate situation.

APPENDIX

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(If combination rate legally applicable, show each factor thereof.)

Rate legally applicable _____ per ton or cwt _____ carload min. _____ for _____ ft. car.

Tariff authority....., D. C. C. No., page ..., effective....

Rate sought to be applied per $\begin{cases} \text{ton} \\ \text{or} \\ \text{car} \end{cases}$ carload min. wt. for ft. car.

Tariff authority..... I. C. C. No., page, effective

Aggregate freight charges at claimed rate would be \$

EXPLANATION AND COMMENTS.

(Insert here such explanation as the case may require. If shipment was reconsigned, state tariff authority for reconsignment. If shipment was misrouted by carrier, state routing instructions given by consignor and the proper route in detail; with specific admission that misrouting was caused by carrier's agent.)

HANDLING THE CASE.

It is admitted that the rates or rules legally applicable at the time and over the route shipment moved were, under all the circumstances and conditions then existing, excessive and unreasonable.

It is agreed that the order of the Commission authorizing refund herein may require that the published tariff rates and rules upon which adjustment is based shall be maintained (as maxima) for a period of not less than one year from the date on which the rates or rules sought to be applied became effective.

The undersigned who makes this application in the name of his company certifies that he has familiarized himself with all the facts and figures upon which this application for reparation is made and knows the same to be correct.

Respectfully submitted,

..... Company,
Defendant,
..... By*.....
(City) (State) (Personal Signature)
..... Its
..... , 19

The undersigned companies join in the foregoing application:

..... Company,
Defendant,
..... By*.....
(Personal signature)
..... Its
..... Company,
Defendant,
..... By*.....
(Personal signature)
..... Its
.....

*The foregoing application must be personally signed by an executive or general officer of the accounting or aific department, and not by a subordinate.

I....., have carefully read the foregoing application and certify that the facts as therein set forth have been verified by a check against the accounts affected as audited under my direction, and I now certify that the records of this company show:

1. That the aggregate weight was..... pounds.
2. That the aggregate freight charge actually collected and retained was \$.....
3. That the amount of the refund to which the above-named complainant [are entitled, on the basis of the reduced rate, is \$....., and that the present rate is \$..... per {^{lbt.} ton}.
4. The attached statement of billing, Exhibit 1, corresponds to the checked billing of the auditing department.

..... (Personal signature)

..... (Comptroller or General Audit.)

**This certificate must be personally signed by the comptroller or the accounting officer in charge of freight revenue accounts, and not by a subordinate.

The foregoing certificate by the accounting officer of the applicant carrier must be used in every case and must show the aggregate charges as per the bill, and the charges or part of the charges, were collected by another carrier or carriers the following certificate will also be used, and in that event the above certificate, far as the charges collected are concerned will be understood to be based on and will be used by the assumed correctness of the following certificate.

If the applicant carrier did not collect the freight charges, the carrier which made the collection will use the following supplemental certificate, and if a third carrier collected part of the charges, the special certificate will also be used, and the supplemental certificate will be understood to be based on and qualified by the assumed correctness of the special certificate.

SUPPLEMENTAL CERTIFICATE.

I, the of the

Rail. Company, have carefully read the foregoing application and now certify that the records and accounts of this company, as audited under my direction, show:

1. That the aggregate weight was pounds
2. That the aggregate freight charge, actually collected and retained, was \$
3. That the attached statement of billing, Exhibit 1, corresponds to the checked billing of the auditing department of this company.

..... (Comptroller or General Auditor)

*This certificate must be personally signed by the comptroller or accounting officer in charge of freight revenue accounts, not by a subordinate.

If a carrier, other than the applicant and not the carrier using the supplemental certificate, has collected any part of the charges the following special certificate will also be used

SPECIAL CERTIFICATE.

I, the of the Rail. Company, have carefully read the foregoing application and now certify that the records and accounts of this company, as audited under my direction, show:

1. That the aggregate weight was pounds.
2. That additional freight charges were collected by this company to the amount of \$

..... (Personal signature.)

..... (Comptroller or General Auditor)

*This certificate must be personally signed by the comptroller or accounting officer in charge of freight revenue accounts, not by a subordinate

COMPLAINANT'S CERTIFICATE.

I hereby certify that charges of \$..... on the shipments involved herein were paid and borne as such by

..... Co., and by no other.

By..... Its.....

Subscribed and sworn to before me this..... day of A. D. 19

[SEAL]

Notary Public.....

INSTRUCTIONS—READ CAREFULLY.

1. Under section 16 of the interstate commerce act, claims for reparation are barred if not filed within two years from the date the cause of action accrues, except that under section 206(f) of the transportation act, 1920, the period of Federal control shall not be computed as a part of the period of limitation in causes arising prior to Federal control.

2. This application should be accompanied by the original paid freight bills (and bills of lading if misrouting is involved), which will be returned by the Commission after the claim has been acted upon.

3. Where the application is for authority to refund to the consignee when the papers show that the charges were paid by the consignor, since it is believed that complainant is neither the consignor nor consignee, the Commission requires that stipulation be filed with the application, signed by the consignor, by the consignee, and by an executive or general officer of the carrier in substantially the following form:

..... (Here insert names of complainant and defendants as in application to which stipulation relates.)

The undersigned....., the consignor of the following-described shipment (here insert date, car number, commodity, and points of origin and destination) and....., the consignee thereof, and the undersigned..... Rail..... Company, stipulate and agree that any order entered in the above-entitled informal complaint for a refund on account of the excessive freight charges collected on said shipment shall be in favor of (here insert name of consignor or consignee, as case may be).

..... (Signature of consignor.)

..... (Signature of consignee.)

..... Rail..... Co.....

By..... Its.....